

Submitted to Wilbur, Mathews and STEPHEN
~~Haney~~, Circuit Judges.

NO. 9832

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BISHOP TRUST COMPANY, LIMITED, Executor of the Estate of John A. McCandless, deceased,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the
United States Board of Tax Appeals

FILED

NOV 1 - 1941

PAUL P. O'BRIEN.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

E. R. CAMERON, C.P.A.
MILTON CADES, Esq.,
URBAN E. WILD, Esq.,

For Comm'r.:

T. M. MATHER, Esq.,

Docket No. 97943

ESTATE OF JOHN A. McCANDLESS, Dec'd.,
BISHOP TRUST COMPANY, LIMITED,
Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1939

Apr. 11—Petition received and filed. Taxpayer notified. (Fee paid.)

“ 11—Copy of petition served on General Counsel.

“ 11—Request for Circuit hearing in Honolulu filed by taxpayer. 4/11/39 copy served.

May 17—Answer filed by General Counsel.

“ 23—Copy of answer served on taxpayer. Honolulu, Hawaii.

1940

Jan. 9—Hearing set April 29, 1940 in Honolulu.
May 2—Hearing had before Mr. Smith on merits.
Submitted. Appearance of Milton Cades
and Urban E. Wild filed at hearing. Briefs
due August 1, 1940—Replies Sept. 16,
1940.

May 20—Tránscrip of hearing of May 2, 1940 filed.
Jul. 15—Brief filed by taxpayer.
Aug. 1—Brief filed by General Counsel.
Sep. 23—Motion for leave to file the attached reply
brief, brief lodged, filed by taxpayer.
9/23/40 granted.

Nov. 27—Opinion rendered, Smith, Div. 5. Decision
will be entered under Rule 50.
Dec. 20—Computation of deficiency filed by General
Counsel.

Dec. 27—Hearing set Feb. 19, 1941 on settlement.
1941

Jan. 25—Consent to settlement filed by taxpayer.
1/27/41 copy served.
“ 28—Decision entered, Charles P. Smith, Div. 5.
Apr. 19—Petition for review by U. S. Circuit Court
of Appeals, 9th Circuit, and statement of
points filed by General Counsel.
May 13—Proof of service of petition for review and
statement of points filed by General Coun-
sel. (2)
“ 13—Agreed statement of evidence filed.
“ —Agreed praecipe filed [1*]

*Page numbering appearing at top of page of original certified
Transcript of Record.

United States Board of Tax Appeals
Docket No. 97943

ESTATE OF JOHN A. McCANDLESS, DECEASED, BISHOP TRUST COMPANY, LIMITED, Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, symbols IT:FC:LJH-90D, dated February 9, 1939, and as a basis of its proceeding alleges as follows:

I

The petitioner was the duly appointed and acting Executor under the Will and of the Estate of John A. McCandless, deceased, with its principal office and place of business at the corner of King and Bishop Streets, City and County of Honolulu, Territory of Hawaii. [2]

By Order Approving Accounts, Determining Trust and Distributing Estate, of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers in Probate, dated January 21, 1936, Bishop Trust Company, Limited, Executor under

the Will and of the Estate of John A. McCandless, deceased, conveyed, transferred, and delivered on January 22, 1936, to Bishop Trust Company, Limited, the duly appointed and acting Trustee under the Will and of the Estate of John A. McCandless, deceased, the residuary estate of John A. McCandless, deceased, whereupon the Executor, aforesaid, was discharged from its trust as Executor of the Will of John A. McCandless, deceased, subject to the performance of specific acts which have been performed. On January 22, 1936, the Final Receipt of Bishop Trust Company, Limited, Trustee under the Will and of the Estate of John A. McCandless, deceased, acknowledging the distribution to it as such Trustee of all of the assets of every kind and sort remaining in the Estate of John A. McCandless, deceased, pursuant to the order of distribution, aforesaid, was duly filed in the Court, aforesaid.

Bishop Trust Company, Limited, did not inform the Commissioner of Internal Revenue of its discharge as Executor, in the manner provided in section 312 of the Revenue Act of 1934.

II

The notice of deficiency, a copy of which is attached to and made a part of this petition and is marked Exhibit A, was [3] mailed to "Estate of John A. McCandless, Deceased, Bishop Trust Company, Limited, Executor," on February 9, 1939.

III

The tax in controversy is income tax for the taxable year begun February 1, 1935, and ended January 31, 1936, and in the amount of Fifteen Thousand Four Hundred Eight Dollars and thirty-three cents (\$15,408.33).

IV

The determination of income tax set forth in said notice of deficiency is based upon the following errors:

A. The Commissioner of Internal Revenue has erred in including in gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, \$49,111.20, which the taxpayer received during said taxable year from John A. McCandless & Company, Limited, a **domestic corporation**, and which was a distribution of capital;

B. The Commissioner of Internal Revenue has erred in denying as deductions from gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, \$2,925.00 professional fees and \$1,859.35 traveling expenses, which were paid by the taxpayer during said taxable year as ordinary and necessary expenses incurred in carrying on its business;

C. The Commissioner of Internal Revenue has erred in denying as an additional deduction from gross income in the determination of the taxpayer's statutory net income for the [4] taxable year ended January 31, 1936, \$20,504.58, which represents in-

come received by the taxpayer during the taxable year aforesaid that was properly paid during such year to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the Will and of the Estate of John A. McCandless, deceased;

D. The Commissioner of Internal Revenue has erred in determining that there is a deficiency of \$15,408.33 (or of any other amount) in the taxpayer's income tax for the taxable year ended January 31, 1936.

V

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. The taxpayer's accounting at all times was on the cash receipts and disbursements basis.

B. Taxpayer's fiscal year was the twelve months' period begun February 1 and ended January 31, and the taxable year involved in this proceeding is the taxable period begun February 1, 1935, and ended January 31, 1936.

C. All of the taxpayer's Federal income-tax returns on Forms 1040 and 1041 conformed to its accounting methods and period, aforesaid, and were filed with the Collector of Internal Revenue for the District of Hawaii, Honolulu, T. H.

Capital Distribution

D. During the taxable year ended January 31, 1936, the taxpayer received from John A. McCandless & Company, Limited, a domestic corporation, distributions which totaled \$49,111.20. [5]

E. The fiscal and taxable year of John A. McCandless & Company, Limited, was and is the calendar year, and the \$49,111.20 distributed to the taxpayer during its taxable year ended January 31, 1936, was the total of a series of distributions made by John A. McCandless & Company, Limited, during the period begun February 1, 1935, and ended December 31, 1935.

F. At no time during the calendar year 1935 did John A. McCandless & Company, Limited, have earnings or profits accumulated after February 28, 1913.

G. The \$49,111.20 aforesaid was a distribution from the capital of John A. McCandless & Company, Limited, made during the period begun February 1, 1935, and ended December 31, 1935.

H. The Commissioner of Internal Revenue included in gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, the \$49,111.20 distribution of capital made by John A. McCandless & Company, Limited, aforesaid.

Business Expenses

I. Throughout the period begun on March 4, 1930, with the issuance of Letters Testamentary, and ended with its discharge, on January 22, 1936, the taxpayer, Bishop Trust Company, Limited, Executor under the Will and of the Estate of John A. McCandless, deceased, was engaged in business.

J. During the fiscal year begun February 1, 1935, and ended January 31, 1936, the taxpayer paid

as ordinary and [6] and necessary expenses incurred during said taxable period in carrying on its business, \$2,925.00 in accountant's fees and \$1,859.35 in accountant's traveling expenses.

K. The Commissioner of Internal Revenue denied as deductions from gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, the \$2,925.00 accountant's fees and the \$1,859.35 accountant's traveling expenses, paid as aforesaid.

Distribution to Beneficiary

L. The gross income of the taxpayer for the taxable year ended January 31, 1936, consisted solely of dividends received from domestic corporations; the total amount thereof was \$31,248.09.

M. Included in the residuary estate of the taxpayer which was conveyed, transferred, and delivered, on January 22, 1936, to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the Will and of the Estate of John A. McCandless, deceased, pursuant to an order of court made January 21, 1936, was \$20,504.58 of the \$31,248.09 cash income received by the taxpayer during the taxable year ended January 31, 1936.

N. Of the income of the taxpayer received during the fiscal year ended January 31, 1936, the taxpayer properly paid within the taxable year aforesaid to the sole residuary legatee under the Will and of the Estate of John A. McCandless, deceased, on January 22, 1936, \$20,504.58. [7]

O. The Commissioner of Internal Revenue denied as an additional deduction from gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, the \$20,504.58 aforesaid.

P. Bishop Trust Company, Limited, Trustee and sole residuary legatee under the Will and of the Estate of John A. McCandless, deceased, included in its gross income for the taxable year begun February 1, 1935, and ended January 31, 1936, the \$20,504.58 income properly paid to it on January 22, 1936, by the taxpayer, and duly paid Federal income tax thereon.

VI

Wherefore, the petitioner prays that the Board may hear this proceeding and determine—

A. That the \$49,111.20 received by the taxpayer from John A. McCandless & Company, Limited, during the taxable year ended January 31, 1936, was a distribution of capital and was not taxable income;

B. That the \$2,925.00 accountant's fees and the \$1,859.35 accountant's traveling expenses paid by the taxpayer during the taxable year ended January 31, 1936, were ordinary and necessary expenses incurred in carrying on the taxpayer's business and are deductible from gross income in determining the taxpayer's statutory net income for the taxable year aforesaid;

C. That the \$20,504.58 paid by the taxpayer to the sole residuary legatee during the taxable year

ended January 31, [8] 1936, was income properly paid to said legatee and was a deduction from gross income in determining the taxpayer's statutory net income for said taxable year, and

D. That there is no income tax due from the taxpayer for the fiscal year begun February 1, 1935, and ended January 31, 1936.

(S) E. R. CAMERON

Counsel for Petitioner, 314-19
Bishop Trust Building, P. O.
Box 2906, Honolulu, T. H.

Territory of Hawaii
County of Honolulu—ss.

T. G. Singlehurst, being first duly sworn, says that he is the treasurer of Bishop Trust Company, Limited, the petitioner above-named; that Bishop Trust Company, Limited, was the duly appointed and acting Executor under the Will and of the Estate of John A. McCandless, deceased, and that Bishop Trust Company, Limited, was duly discharged as such Executor prior to the mailing of the deficiency letter of February 9, 1939, addressed to it as Executor; that as treasurer of Bishop Trust Company, Limited, formerly executor under the Will and of the Estate of John A. McCandless, deceased, he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements made therein are true, except as to those statements which are [9] obviously based upon

information and belief and those statements he believes to be true.

(S) T. G. SINGLEHURST

Treasurer, Bishop Trust Company, Limited, formerly Executor under the Will and of the Estate of John A. McCandless, deceased, Honolulu, T. H.

Subscribed and sworn to before me this 30th day of March, A. D., 1939.

(Seal) (S) PHILIP H. LEVEY
Notary Public, First Judicial Circuit, Territory of Hawaii. [10]

EXHIBIT A

Treasury Department
Internal Revenue Service
Honolulu, T. H.

Office of
Internal Revenue Agent in Charge
Honolulu Division
IT:FC:LJH-90D

February 9, 1939.

Estate of John A. McCandless, Deceased,
Bishop Trust Company, Limited, Executor,
King and Bishop Streets,
Honolulu, T. H.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended Jan-

uary 31, 1936 discloses a deficiency of \$15,408.33 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Honolulu, T. H. for the attention of IT:FC:LJH. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By (Sgd.) H. A. PETERSON

Internal Revenue Agent in

Charge.

Enclosures:

Statement.

Form of waiver. [11]

IT:FC:LJH-90D

STATEMENT

#5053

Estate of John A. McCandless, Deceased, Bishop Trust Company, Limited, Executor, Honolulu, T. H.

Tax Liability for the Taxable Year Ended
January 31, 1936

Income tax

Liability—\$15,408.33.

Assessed—None.

Deficiency—\$15,408.33.

In making this determination of your income tax liability, careful consideration has been given to the reports of examination dated January 31, 1938; to your protest dated March 28, 1938; and to the statements made at the conferences held on April 29, 1938 and November 14, 1938.

From information on file in this office, it appears John A. McCandless died testate on January 30, 1930. The Bishop Trust Company, Ltd., was executor under the will, which, after providing for payment of decedent's just debts and specific bequests, directed that the balance of the estate be turned over to the Bishop Trust Company in trust.

On January 22, 1936, pursuant to the order of the Court, First Judicial Circuit, Territory of Hawaii, filed January 21, 1936, there was turned over to the Bishop Trust Company, Ltd, Trustee, John A. McCandless Trust, \$20,504.58, which was reported as follows on the return filed by you:

“Final return of Estate in administration on January 25, 1936, \$20,504.88 was distributed to

Bishop Trust Company, Ltd., Trustee under the will of John A. McCandless, deceased, by Bishop Trust Company, Ltd., Executor, \$19,423.72 of which has been returned by the Trustee in its returns on form 1041 and form 1040 for the fiscal year ended January 31, 1936."

The cash payment has been disallowed as a deduction in determining your net income as such payment does not constitute an allowable deduction under the provisions of section 162(c) of the Revenue Act of 1934 in computing the net income of the estate.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$ none [12]
--	-----------------

Unallowable deductions and additional income:

(a) Dividends received	80,359.29
------------------------------	-----------

Nontaxable income and additional deductions:

(b) Capital net loss.....	\$ 2,000.00
(c) Interest paid	356.68
(d) Taxes paid	401.27
(e) Other deductions	4,067.15
	6,825.10

Net income adjusted.....	\$73,534.19
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EXPLANATION OF ADJUSTMENTS

(a) Dividends received as follows:

Pioneer Mill Co., Ltd.....	\$ 7,667.00
Ewa Plantation Co., Ltd.....	1,200.00
Oahu Sugar Co., Ltd.....	7,750.00
Home Insurance Co. of Hawaii, Ltd.	1,800.00
McCandless Building Co., Ltd.....	2,188.80
C. Brewer & Co., Ltd.....	3,888.00
Waialua Agricultural Co., Ltd.....	720.00
Bank of Hawaii.....	1,524.00

Inter-Island Steam Navigation Co., Ltd.	2,380.00
Pacific Gas & Electric Co.	99.04
Bishop Trust Co., Ltd.	31.25
J. A. McCandless Co., Ltd.	49,111.20
Alexander & Baldwin, Ltd.	2,000.00

	\$80,359.29

(b) Capital net loss as deducted in form 1041.

(c) Interest paid as deducted in form 1041.

(d) Taxes paid as deducted in form

1041 \$ 400.19

Excise tax paid on dividends re-
ceived from C. Brewer & Co., Ltd. 1.08_____
\$ 401.27

[13]

(e) Income commissions	\$ 4,044.23
Sundry expense	22.92

	\$ 4,067.15

COMPUTATION OF TAX

Net income adjusted	\$73,534.19
Less:	
Personal exemption	1,000.00

Balance (surtax net income)	72,534.19
Less:	
Dividends	80,359.29

Net income subject to normal tax	None
Surtax on \$72,534.19	\$15,408.33
Correct income tax liability	\$15,408.33
Income tax assessed	None

Deficiency of income tax	\$15,408.33

[Endorsed]: U. S. B. T. A. Filed April 11, 1939.

[14]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

I. Admits the first and last sentences contained in paragraph I of the petition, but, for lack of information, denies the remaining allegations contained in said paragraph.

II. Admits the allegations contained in paragraph II of the petition.

III. Admits the allegations contained in paragraph III of the petition.

IV. A, B, C, D. Denies that the Commissioner erred in the determination of the deficiency as alleged in subparagraphs A to D, inclusive, of paragraph IV of the petition. [15]

V. A to D, inclusive. Admits the allegations contained in subparagraphs A to D, inclusive, of paragraph V of the petition.

E. For lack of information, denies the allegations contained in subparagraph E of paragraph V of the petition.

F. Denies the allegations contained in subparagraph F of paragraph V of the petition.

G. Denies the allegations contained in subparagraph G of paragraph V of the petition.

H. Admits the Commissioner of Internal Revenue included in gross income in the determination

of the taxpayer's statutory net income for the taxable year ended January 31, 1936, the \$49,111.20 distribution made by John A. McCandless & Company, Limited, as alleged in subparagraph H of paragraph V of the petition, but denies the remaining allegations contained in said paragraph.

I. Denies the allegations contained in subparagraph I of paragraph V of the petition.

J. Denies the allegations contained in subparagraph J of paragraph V of the petition.

K. Admits the Commissioner of Internal Revenue denied as deductions from gross income in the determination of the taxpayer's statutory net income for the taxable year ended January 31, 1936, the \$2,925.00 accountant's fees and the \$1,859.35 accountant's traveling expenses, as alleged in subparagraph K of paragraph V of the petition. [16]

L. Denies the allegations contained in subparagraph L of paragraph V of the petition.

M. Admits that included in the residuary estate of the taxpayer which was conveyed, transferred, and delivered, on January 22, 1936, to Bishop Trust Company, Limited, Trustee, under the will and of the estate of John A. McCandless, deceased, pursuant to an order of court made January 21, 1936, was \$20,504.58 cash income received by the taxpayer during the taxable year ended January 31, 1936, as alleged in subparagraph M of paragraph V of the petition, but denies the remaining allegations contained in said paragraph.

N. Denies the allegations contained in subparagraph N of paragraph V of the petition.

O. Admits the allegations contained in subparagraph O of paragraph V of the petition.

P. Denies the allegations contained in subparagraph P of paragraph V of the petition.

VI. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that the petitioner's appeal be denied.

Signed J. P. WENCHEL

TMM

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

T. M. MATHER,

Special Attorneys, Bureau of Internal
Revenue.

TMM:emb 5-9-39

[Endorsed]: U. S. B. T. A. Filed May 17, 1939.

[17]

[Title of Board and Cause.]

Docket No. 97943. Promulgated November 27, 1940.

1. During the taxable year a portion of the income of the decedent's estate in process of administration or settlement was turned over to the trustee

of a testamentary trust, which returned it, less deductible expense, for income tax. Held, following Estate of Ida A. White, 41 B. T. A. 525, that the amount so turned over to the trustee is a legal deduction from gross income under section 162 (c) of the Revenue Act of 1934.

2. During the taxable year the petitioner paid the fees and traveling expenses of an accountant incurred in adjusting petitioner's income taxes for prior taxable years. Held, that the amounts paid are not legal deductions from gross income.

Urban E. Wild, Esq., Milton Cades, Esq., and E. R. Cameron, C. P. A., for the petitioner.

T. M. Mather, Esq., for the respondent.

OPINION

Smith: This is a proceeding for the redetermination of a deficiency of \$15,408.33 in income tax of the estate of John A. McCandless, deceased, during the period of administration or settlement for the fiscal year ended January 31, 1936. Only a portion of the deficiency is in controversy.

The petitioner alleges that the respondent erred in disallowing the deduction from gross income of (1) \$2,925 professional fees and \$1,859.35 traveling expenses which were paid by the estate during the taxable year as ordinary and necessary expenses incurred in carrying on its business, and (2) \$20,-504.58 representing income received by the estate during the taxable year "that was properly paid during such year to Bishop Trust Company, Lim-

ited, Trustee and sole residuary legatee under the Will and of the Estate of John A. McCandless, deceased."

The petitioner, Bishop Trust Co., Ltd., of Honolulu, Territory of Hawaii, was during the taxable year 1936 the duly appointed and [18] acting executor under the will and of the estate of John A. McCandless, who died a resident of Honolulu on January 30, 1930.

The decedent left a large estate. He named the Bishop Trust Co., Ltd., an Hawaiian corporation, as his executor, and also as the testamentary trustee of his residuary estate, and it duly qualified as such. The decedent provided in his will that the executor should pay to his widow \$1,000 per month for support and maintenance during the administration of his estate, the first of such payments to be made one month from the date of his death and succeeding payments in a like amount on the same day of each succeeding month until such time as his residuary estate should be turned over to the testamentary trustee. He also directed that the executor should pay to each of his four grandchildren for support, maintenance, and education during the administration of the estate \$250 per month, the first payment to be made one month from the date of his death and succeeding payments on the same day of each succeeding month until such time as his residuary estate should be turned over to the testamentary trustee. His will further provided:

Eighth. I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated and of every kind or nature, and any property over which I shall possess any power of appointment, to Bishop Trust Company, Limited, an Hawaiian corporation, in trust for the uses and purposes and with the powers as herein-after stated, * * *

The trustee was directed to "pay and deliver from the accumulations and net income of my said trust estate" \$1,000 per month to his widow, beginning one month from the date of the last monthly payment made to the widow by the executor and continuing until such time as his eldest grandchild should attain the age of 21 years, after which the widow was to receive one-tenth of the annual net income of the trust. The trustee was also directed to "pay and deliver from the accumulations and net income of my said trust estate" \$250 per month to each grandchild. After a grandchild attained the age of 21 years he or she was to receive one-tenth of the annual net income of the trust estate. Surplus income of the trust estate was to be accumulated and invested. When the youngest grandchild attained the age of 30 years the trust was to determine and one-fifth of the trust estate was to be paid over to the widow, if living, and one-fifth to each grandchild per stirpes.

On January 12, 1936, the executor filed a petition in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, sitting in probate, requesting an approval of its first and final account of the administration of the estate and that "an order be made to deliver over such property as remains to the persons thereto entitled, and [19] that petitioner be relieved from all further responsibilities as executor under the will and of the estate of John A. McCandless."

On January 21, 1936, the court, sitting in probate, entered an order reading in part as follows:

It Is Further Ordered, Adjudged and Decreed that Bishop Trust Company, Limited, shall forthwith upon the signing of this Order, convey, transfer and deliver to Bishop Trust Company, Limited, as Trustee under the Will and of the Estate of John A. McCandless, Deceased, the assets remaining in its hands as Executor aforesaid; and that upon the filing herein of due and proper vouchers showing the receipt by Bishop Trust Company, Limited, as Trustee under the Will and of the Estate of John A. McCandless, Deceased, of the assets remaining in the hands of Bishop Trust Company, Limited, as such Executor, Bishop Trust Company, Limited, be discharged from its trust as Executor of the Will of John A. McCandless, Deceased, in all particulars, except that Bishop Trust Company, Limited, shall remain as such Executor for such time as may be necessary to

secure a substitution of itself, as Trustee as aforesaid, as Party-Petitioner in the two appeals before the United States Board of Tax Appeals against the Commissioner of Internal Revenue now pending, so that said appeals may be properly presented and settled; and when such substitution has been effectuated, then and upon the filing herein of a verified statement by such Executor showing the same, Bishop Trust Company, Limited shall be discharged as such Executor in such particulars without any further order being entered by the Court.

Pursuant to such order the petitioner as executor, on January 22, 1936, transferred and delivered to itself as trustee the residue of the decedent's estate and was discharged as executor of the estate, subject to the performance of specific acts, which have since been performed.

The petitioner kept its accounts and made its income tax returns, on both Form 1040 and 1041, on the cash receipts and disbursements basis and on the basis of a fiscal year beginning February 1 and ending January 31. The returns were filed with the collector at Honolulu.

The gross receipts of the estate for the taxable year ended January 31, 1936, consisted of \$73,111.25 from the sales of shares of stock and \$80,359.29 dividends received from domestic corporations. The respondent determined that the gross income of the estate for income tax purposes consisted solely of

dividends from domestic corporations in the amount of \$80,359.29, from which he permitted the deduction therefrom of a capital net loss of \$2,000, sustained on the sales of shares of stock, and other items of expense aggregating \$4,825.10, and arrived at a net income of \$73,534.19.

Included in the residuary estate of the decedent which the petitioner as executor transferred to itself as trustee on January 22, 1936, pursuant to the order of the court made January 21, 1936, was \$20,504.58 cash which had been received by the executor as income during the taxable year ended January 31, 1936. This amount was [20] claimed as a deduction in the return which the petitioner, as executor, filed on behalf of the estate for the fiscal year ended January 31, 1936.

In the determination of the deficiency herein the respondent disallowed the deduction of the said amount of \$20,504.58 on the ground that it did not constitute an allowable deduction under the provisions of section 162 (c) of the Revenue Act of 1934.

The Bishop Trust Co., Ltd., as testamentary trustee, in the return filed on behalf of the trust for the taxable year begun February 1, 1935, and ended January 31, 1936, included in the gross income of the trust estate \$19,639.72 of the said amount of \$20,504.58 and duly paid income tax thereon.

The petitioner paid to Cameron and Johnstone, certified public accountants, during the taxable year ended January 31, 1936, \$2,925 professional fees and \$1,859.35 traveling expenses. These payments cov-

ered the cost of a trip to California for the investigation for Federal income tax purposes of claims for additional income taxes made upon the petitioner for the fiscal years ended January 31, 1932, January 31, 1933, and January 31, 1934; for conferences in Washington with respect to claims for additional taxes; for filing protests and claims for refund; and for the preparation of the income tax return of the estate for the fiscal year ended January 31, 1935.

Our first question is whether the amount of \$20,504.58 representing the accumulated income of the decedent's estate during the period of administration, which the executor in final settlement of the estate paid over to itself as residuary trustee, is deductible from the gross income of the estate.

Section 162 (e) of the Revenue Act of 1934 provides that:

(e) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall

be included in computing the net income of the legatee, heir, or beneficiary.

This issue is controlled by the Board's decision in *Estate of Ida A. White*, 41 B. T. A. 525, where we held on facts not distinguishable from those in the instant case that the income of an estate in process of administration which was paid over to the residuary trustees and reported as income by the trustees in their fiduciary return for that year was deductible by the estate as income paid to a "legatee" [21] within the meaning of section 162 (c) above. In that case we distinguished *Weigel v. Commissioner* (C. C. A. 7th Cir.), 96 Fed. (2d) 387, on the ground that the income there in dispute was a gain from the sale of corpus of the estate and not from income. In its opinion the Board said:

The respondent cites *Weigel v. Commissioner*, 96 Fed. (2d) 387, affirming 34 B. T. A. 237. The facts in that case are readily distinguishable from those in the case at bar. There the question involved was the gain realized from the sale of corpus. By the terms of the will all estate income became part of the corpus of the trust estate. That situation does not exist here. We find that the income in question preserved its identity from its receipt by the petitioners to its payment to the legatee. It was paid as income. * * *

Here, as in the White case, the amount in dispute was income of the estate, rather than an accretion

to corpus, and it was paid over to the residuary trustee as income.

See also *Lynchburg Trust & Savings Bank v. Commissioner*, 68 Fed. (2d) 356; certiorari denied, 292 U. S. 640; *George G. Allen et al., Trustees*, 40 B. T. A. 351; and *Angier B. Duke*, 38 B. T. A. 1264.

We hold upon authority of the Estate of Ida A. White, *supra*, that the amount of \$20,504.58 is deductible from the gross income of the estate. 

The remaining issue is whether the amounts of \$2,925 and \$1,859.35, representing, respectively, accountant's fees and expenses paid by the executor in connection with the settlement of income tax claims of the Government against the estate for years prior to the taxable year before us are legal deductions from gross income.

Section 162 of the Revenue Acts of 1934 and 1936 provides that the income of an estate in process of administration or settlement shall be computed in the same manner as the income of an individual, with certain exceptions not material to the present issue. Section 23 of the same taxing acts provides for the deduction from the gross income of an individual of "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." (Subdivision (a)).

The immediate question before us then is whether the petitioner was engaged "in carrying on any trade or business" within the meaning of the statute during the fiscal year ended January 31, 1936. It

can not be doubted that in some cases an estate in process of administration or settlement is carrying on a trade or business within the meaning of the Statute. See *Pyne v. United States*, — Ct. Cls. — (Oct. 7, 1940). In that case the court held that upon the evidence the estate was engaged in carrying on a trade or business [22] within the meaning of the statute. The evidence showed that the executor was under the necessity of employing several persons to assist in the administration of the estate.

The record in this proceeding does not, in our opinion, show the carrying on of a trade or business by the petitioner during the taxable year. During such year it sold certain shares of stock belonging to the estate at a loss. Its gross income consisted entirely from the receipt of dividends upon shares of stock of domestic corporations. It paid a firm of accountants fees and traveling expenses in connection with the adjustment of the income taxes of the estate for prior years. If John A. McCandless had been living during the taxable year before us and had received the dividends upon his shares of stock, and made the payments here in question, we do not think it could be held that he was carrying on a trade or business within the meaning of the statute and he would not have been entitled to deduct such payments. See *Deputy v. duPont*, 308 U. S. 488.

The facts before us are substantially the same as those which obtained in *Estate of C. R. Hubbard*,

41 B. T. A. 628. In that case we held that the estate was not engaged in carrying on a trade or business within the meaning of the taxing statute. The action of the respondent in disallowing the deduction from the gross income of the payments here in question is approved.

Decision will be entered under Rule 50. [23]

United States Board of Tax Appeals
Washington

Docket No. 97943

ESTATE OF JOHN A. McCANDLESS, DECEASED, BISHOP TRUST COMPANY, LIMITED, EXECUTOR,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the opinion of the Board promulgated on November 27, 1940, the respondent herein on December 20, 1940 having filed a recomputation of tax and the petitioner on January 25, 1941 having filed an acquiescence to such recomputation, now, therefore, it is

ORDERED and DECIDED: That there is a deficiency in income tax in the amount of \$8,308.88 for the fiscal year ended January 31, 1936.

(Signed) CHARLES P. SMITH
Member

Enter:

Entered Jan. 28, 1941. [24]

In the United States Circuit Court of Appeals
for the Ninth Circuit

B.T.A. Docket No. 97943

GUY T. HELVERING, Commissioner of Internal
Revenue,

Petitioner on Review,

v.

BISHOP TRUST COMPANY, LIMITED, EX-
ECUTOR OF THE ESTATE OF JOHN A.
McCANDLESS, DECEASED,

Respondent on Review.

PETITION FOR REVIEW AND STATEMENT
OF POINTS

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue,

and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I. Jurisdiction

That he is duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States; that the respondent on review, Bishop Trust Company, Limited, Executor of the Estate of John A. McCandless, Deceased (hereinafter sometimes referred to as the taxpayer), is a corporation organized and existing under the laws of the Territory of Hawaii, having its principal office and place of business in Honolulu, Hawaii, and was during the taxable year ended January 31, 1936, the taxable period here involved, the duly appointed and [25] acting Executor under the will and of the Estate of John A. McCandless, deceased, a citizen of the United States and a resident of the City of Honolulu, Territory of Hawaii, who died in Honolulu, Hawaii, on January 30, 1930. By order of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers in Probate, dated January 21, 1936, the said Bishop Trust Company, Limited, transferred and delivered to itself on January 22, 1936, as Trustee under the will and of the Estate of John A. McCandless, deceased, the residuary estate of the deceased and has been since said distribution and now is the duly appointed, qualified, and acting Trustee under the will and of the Estate of John A. McCandless, deceased. The tax-

payer did not inform the Commissioner of its discharge as Executor of the Estate of the deceased in the manner provided in Section 312 of the Revenue Act of 1934.

The taxpayer filed its Federal income tax return for the fiscal year ended January 31, 1936, with the Collector of Internal Revenue for the District of Hawaii, whose office is located in the City of Honolulu, Hawaii, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II.

Prior Proceedings

On February 9, 1939, the Commissioner determined a deficiency in Federal income tax liability against the taxpayer for the fiscal year ended January 31, 1936, in the amount of \$15,408.33 and sent to the taxpayer, by registered mail, a notice of said deficiency in accordance with the provisions [26] of existing internal revenue laws. Thereafter and on April 11, 1939, the taxpayer filed an appeal from said determination of the Commissioner with the United States Board of Tax Appeals.

The appeal was duly tried to the United States Board of Tax Appeals and under date of November 27, 1940, the Board promulgated its findings of fact and opinion, pursuant to which opinion decision was entered by the Board on January 28, 1941,

wherein and whereby it was ordered and decided that there is a deficiency in income tax in the amount of \$8,308.88 for the fiscal year ended January 31, 1936.

III.

Nature of Controversy

The decedent, John A. McCandless, died testate on January 30, 1930, leaving a large estate and naming the Bishop Trust Company, Limited, as his executor and also as the testamentary trustee of his residuary estate. In his will the decedent, after making provision for certain monthly payments by the executor to his widow and his four grandchildren until such time as his residuary estate should be turned over to the designated testamentary trustee, gave and bequeathed certain specific amounts to other designated parties, devised and bequeathed certain properties to his widow, and made the further provision that:

“I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated and of every kind or nature, and any property over which I shall possess any power of appointment, to Bishop Trust Company, Limited, an Hawaiian corporation, in trust for the uses and purposes and with the powers as herein-after stated, * * *” [27]

The trustee was directed to continue the monthly payments to the widow until the eldest grandchild should attain the age of 21 years, after which the

widow was to receive one-tenth of the annual net income of the trust estate, and to continue the monthly payments to each grandchild until he or she attained the age of 21 years when he or she was to receive one-tenth of the annual net income of the trust estate. The surplus income of the trust estate was to be accumulated and invested and when the youngest grandchild should attain the age of 30 years the trust was to determine and a one-fifth portion of the estate was to be paid over to the widow, if living, and one-fifth to each grandchild per stirpes.

Pursuant to the order of court, as aforesaid, the taxpayer executor, on January 22, 1936, transferred and delivered to itself as trustee the residue of decedent's estate. For the fiscal year beginning February 1, 1935, the estate had gross receipts of \$73,-111.25 from sales of shares of stock and \$80,359.29 in dividends received from domestic corporations. The Commissioner determined that the gross income of the estate for income tax purposes consisted solely of dividends from domestic corporations in the amount of \$80,359.29, from which he permitted the deduction therefrom of a capital net loss of \$2,000, sustained on the sales of shares of stock, and other items of expense aggregating \$4,825.10, and arrived at a net income of \$73,534.19. Among the assets of the residuary estate which were transferred to the trustee on January 22, 1936, was \$20,504.58 cash which had been received by the executor as income during the taxable year ended January 31,

1936, and which was claimed as a deduction from gross income in the return filed on behalf of the estate for the fiscal year ended January 31, 1936. The Commissioner disallowed the claimed deduction on the ground that the amount so [28] transferred did not constitute an allowable deduction under the provisions of Section 162(c) of the Revenue Act of 1934.

IV.

STATEMENT OF POINTS

Following is a concise statement of the points upon which the Commissioner intends to rely on the review herein petitioned, to-wit:

The United States Board of Tax Appeals erred:

1. In ordering and deciding that there is a deficiency in income tax for the fiscal year ended January 31, 1936, in the amount of only \$8,308.88.
2. In failing to order and decide that there is a deficiency in income tax for the fiscal year ended January 31, 1936, in the amount of, to-wit, \$15,408.33 as determined by the Commissioner.
3. In holding and deciding that \$20,504.58 representing income received by the estate during the taxable year "that was properly paid during such year to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the will and of the Estate of John A. McCandless, deceased" was a legal deduction from gross income under Section 162(c) of the Revenue Act of 1934.
4. In failing to hold and decide that \$20,504.58 representing income received by the estate during

the taxable year "that was properly paid during such year to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the will and of the Estate of John A. McCandless, deceased" was not a legal deduction from gross income under Section 162(c) of the Revenue Act of 1934.

5. In holding and deciding that \$20,504.58 representing income [29] received by the estate during the taxable year "that was properly paid during such year to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the will and of the Estate of John A. McCandless, deceased" was paid to the residuary trustee as income.

6. In failing to hold and decide that \$20,504.58 representing income received by the estate during the taxable year "that was properly paid during such year to Bishop Trust Company, Limited, Trustee and sole residuary legatee under the will and of the Estate of John A. McCandless, deceased" was not paid over to the residuary trustee as income but rather that the amount so transferred was paid over as part of the res of the residuary trust established by the will of John A. McCandless, deceased.

7. In that its opinion and decision are not supported by but are contrary to its findings of fact.

8. In that its opinion and decision are not supported by the evidence and are contrary to law.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit

Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

(Signed) J. P. WENCHEL

RLW

Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

CHARLES E. LOWERY,

Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: U. S. B. T. A. Filed Apr. 19, 1941.

[30]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR RE-
VIEW AND STATEMENT OF POINTS

To:

Urban E. Wild., Esq.,
Milton Cades, Esq.,
400 Bishop Trust Building,
Honolulu, Territory of Hawaii.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of April, 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above-entitled case and a statement of points. A copy of the petition for review and the statement of points as filed is hereto attached and served upon you.

Dated this 19th day of April, 1941.

(Signed) J. P. WENCHEL
RLW

Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review

and the statement of points mentioned therein, is hereby acknowledged this 26 day of April, 1941.

URBAN E. WILD
MILTON CADES
Counsel for Respondent on
Review.

[Endorsed]: U. S. B. T. A. Filed May 13, 1941.
[31]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR RE-
VIEW AND STATEMENT OF POINTS

To:

Bishop Trust Company, Limited,
Corner of King and Bishop Streets,
Honolulu, Territory of Hawaii.

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of April, 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above-entitled case and a statement of points. A copy of the petition for review and the statement of points as filed is hereto attached and served upon you.

Dated this 19th day of April, 1941.

(Signed) J. P. WENCHEL

RLW

Chief Counsel,

Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and the statement of points mentioned therein, is hereby acknowledged this 26 day of April, 1941.

BISHOP TRUST COMPANY,
LIMITED, EXECUTOR OF
THE ESTATE OF JOHN A.
McCANDLESS, DECEASED,

W. W. WHITE

Vice Pres.

Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed May 13, 1941.

[32]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

STATEMENT OF EVIDENCE

This proceeding came on for hearing on May 2, 1940, before the Honorable Charles P. Smith, Member of the United States Board of Tax Appeals, at Honolulu, Hawaii. The taxpayer was represented by Urban E. Wild, Esq., Milton Cades, Esq., and

E. R. Cameron, C. P. A., Honolulu, T. H., and the Commissioner by T. M. Mather, Esq.

After counsel had made their respective statements of the case, the following evidence was presented to the Board:

There were offered and received in evidence as petitioner's (taxpayer's) exhibits the following documents:

Exhibit 1—Federal income tax return, Form 1040, of the Estate of John A. McCandless, deceased, for the fiscal year ended January 31, 1936.

Exhibit 2—Federal fiduciary return, Form 1041, of the Estate of John A. McCandless, deceased, for the fiscal year ended January 31, 1936.

Exhibit 3—Federal income tax return, Form 1040, of John A. McCandless trust for the fiscal year ended January 31, 1936.

Exhibit 4—Federal fiduciary return, Form 1041, of John A. McCandless trust for the fiscal year ended January 31, 1936. [33]

Exhibit 5—Copy of will of John A. McCandless, deceased.

Exhibit 6—Copy of order approving account, determining trust and distributing estate of John A. McCandless, deceased.

Exhibit 7—Final receipt certified to by clerk of the court showing receipt by Bishop Trust Co., Ltd., of assets of estate of John A. McCandless, deceased.

MR. ERNEST ROY CAMERON,

called as a witness by and on behalf of the petitioner (taxpayer) having been first duly sworn, was examined and testified in respect of certain items of traveling expense and professional fees not here involved in this review. Such testimony, therefore, is not herein narrated.

MR. ERNEST ROY CAMERON,

having been previously sworn, was examined and testified as follows as a witness for the Commissioner:

By Mr. Mather:

Q. Mr. Cameron, I previously showed you a document which I believe you admitted was prepared by you or under your direction?

A. It was prepared by me.

Q. Does that document contain receipts and disbursements of this Petitioner for the taxable year here in question as shown by their books of account?

A. It does in summarized form.

Q. And the figures thereon were taken from the books? A. They were.

Mr. Mather: If your Honor please, at this time I will offer in evidence document just testified to by counsel for the purpose of showing receipts and disbursements as shown on the books of this petitioner for the taxable year in question.

Mr. Wild: What is the purpose of the exhibit, what is the purpose?

(Testimony of Ernest Roy Cameron.)

Mr. Mather: For the purpose of showing the receipts and disbursements as shown by the books of this taxpayer for the taxable year involved in this proceeding before the Board. [34]

Mr. Wild: That is not an issue, Your Honor. If you want me to admit that the Bureau of Internal Revenue after careful study of the matter, admitted that the \$20,534 and odd cents was income of the estate during that period of time, I, on information, am now prepared to make that admission. That admission is made on the basis of figures similar to these and I am perfectly willing to admit that, Your Honor, but these figures have no bearing on any issue. I do not see what basis they are offered on. There is no claim that there was any omitted income in the return. There is no claim that they, together with the 90-day letter, do not state the true picture. Nothing of that sort, Your Honor. In consequence, I can see no reason at this time, for introducing this exhibit in evidence. I might say I merely glanced at it, I have not digested it.

Mr. Mather: One of the reasons involved in this proceeding is whether this Petitioner is entitled to deduction of \$20,000 some odd from its return during the period of administration that is involved in this proceeding, that is one of the issues. Now the Commissioner disallowed as a deduction that \$20,000.

I stated one reason in my opening statement why it was disallowed. The question for decision by this Board is whether or not this Petitioner is entitled

(Testimony of Ernest Roy Cameron.)

to deduction. I certainly have a right to present evidence with respect to the deductibility of that item for this taxable year.

Mr. Wild: May it please the Court, it looks to me as if counsel is trying to get something into the record, on which he can argue, though that is not the fact, that this \$20,000 was not income. That is already admitted in the evidence. It is an admission. [35]

If no part of this exhibit is for that purpose of arguing, anything to show in regard to whether or not the \$20,000 is income, that is one set of affairs; if it is for a different purpose, then I think you ought to state it frankly to the Court.

Mr. Mather: I am stating it very fully. It is offered for the purpose of showing whether or not this Petitioner is entitled to a deduction of the \$20,000 item from income for the taxable year, that is in this proceeding before the Board.

Mr. Wild: And it is offered, is it, together with the admission that the amount shown is income?

Mr. Mather: No, sir, it is not.

Mr. Wild: Then we renew our objection, Your Honor.

The Member: The objection is overruled.

Mr. Wild: To which we may have our exception?

The Member: Exception noted. It may be received in evidence as Respondent's Exhibit A.

(The said document, statement of receipts and disbursements and expenditures, estate of

(Testimony of Ernest Roy Cameron.)

John A. McCandless, deceased, February 1, 1935 to January 31, 1936, so offered and received in evidence, was marked Respondent's Exhibit A and made a part of this record.)

Cross Examination

By Mr. Wild:

Q. Mr. Cameron, showing you this exhibit, Respondent's Exhibit A, does that show anything concerning the connection of the \$20,534 and odd cents of cash that was on hand on January 22, 1936?

A. It does (examining paper).

Q. What does it show that sum was?

A. The nature of the sum?

Q. Yes. [36] -

A. It shows that it was income received by the estate in administration during the fiscal year ended January 21, 1936.

Mr. Mather: Well, now, if Your Honor please, I will ask that that answer be stricken as not responsive to the question, because I did not have an opportunity to object to any such answer as that. The question was "Does this exhibit show" —

The Member: Read the question, Mr. Reporter.

(Whereupon, the Reporter read the question as recorded.)

Mr. Mather: Now that answer calls for an it does or it doesn't answer, and it does not call for a conclusion as to what the character is.

Mr. Wild: May it please the Court, as I understand the rule of evidence, the only party who can

(Testimony of Ernest Roy Cameron.)

make a motion to strike an answer which is not responsive, is the party propounding the question. I do not think counsel's ground there would be well taken.

The Member: The motion to strike the answer is granted, and read the question again. Let the witness again answer the question.

(Whereupon, the Reporter read the question as above recorded.)

The Member: First, let me ask what was the actual amount of the cash that was on hand on the date stated?

The Witness: \$20,534.58.

The Member: Now, can you answer Mr. Wild's question?

The Witness: I think the answer was before and is now that it does.

By Mr. Wild:

Q. What does it show the sum of money to be?

A. That is the question I answered.

Mr. Mather: The exhibit speaks for itself.

The Member: That objection is overruled. [37]

Mr. Mather: Exception.

A. It shows the balance of the income realized in the fiscal year ended January 21, 1936 received by the Executor of the Estate of John A. McCandless, deceased.

By Mr. Wild:

Q. What is the amount of that balance of income on hand? A. \$20,504.58.

(Testimony of Ernest Roy Cameron.)

Mr. Wild: No further cross-examination.

Mr. Mather: No further questions.

The foregoing statement, together with the exhibits mentioned therein, constitutes all of the evidence adduced at the hearing before the United States Board of Tax Appeals material to the review taken by the Commissioner.

J. P. WENCHEL

Chief Counsel,

Bureau of Internal Revenue.

Attorney for Petitioner on
Review.

URBAN E. WILD

MILTON CADES

Attorneys for Respondent on
Review. [38]



PROBATE JUDICIARY RETURN OF INCOME For Calendar Year 1936

Please file your return February 1, 1937, and mail January 21, 1937.

File this Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year
(PRINT NAME AND ADDRESS PLAINLY AND LEGIBLY)

Name of Testator JOHN A. McCANDLESS, DECEASED

Name and Address of Fiduciary Bishop Trust Company, Ltd.

King & Bishop Streets

Honolulu, T. H.

Do Not Write in These Spaces

No. 126
Date 1-23-37

Date _____

Date _____

Date _____

Date _____

1. Was a return of income for the prior year filed on behalf of the estate or trust named above? Yes
2. If no, in which testator's office was it filed? (Give name or city and state) Honolulu
3. If copy of will or trust instrument and statement required under Instruction 23 have been previously furnished, state where and with whom they were filed. Estate Tax return: Collector of Internal Revenue, Honolulu, T. H.
4. State whether books are kept on cash or accrual basis. Cash
5. Did any person or persons advise you in respect of any question or matter affecting any item or schedule of this return, or assist or advise you in the preparation of this return for you? (Answer "Yes" or "No"). If "Yes", give the name and address of such person or persons and state the name and nature of the assistance or advice received by you and the name or address of respect of which the assistance or advice was received. If this return is incompletely prepared by any person or persons other than yourself, state the source of the information reported in this return and the person in whom it was furnished to or obtained by such person or persons. Cameron A. Johnston Books
6. Did you make a return of information on Forms 1096 and 1099 (see Instruction 26) for the calendar year 1935? (Answer "Yes" or "No") No

INCOME

1. Net Profit (or Loss) from Trade or Business. (From Schedule A)	
2. Interest on Bank Deposits, Notes, and Corporation Bonds, etc. (except interest on tax-free investment bonds)	
3. Interest on Tax-free Government Bonds upon which a tax was paid at source	
4. Income (or Loss) from Partnerships, Syndicates, Pools, etc., and Fiduciaries. (State name and address)	
5. Bonds and Securities. (See Schedule B)	
6. Capital Gains (or Loss). (See Schedule C)	2,000.00
7. Dividends on Stock of:	
(a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1936	31,082.00
(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1936	
(c) Foreign Corporations	
8. Other Income. (See notes of income)	
9. Total Income as shown in Item 1 to 8.	32,082.00

DEDUCTIONS

10. Interest Paid. (Subject to Schedule D)	556.50
11. Taxes Paid. (Subject to Schedule D)	400.10
12. Losses by Fire, Storm, etc. (Subject to Table at bottom of page D)	
13. Bad debts (including bonds determined to be worthless during taxable year). (Subject to Schedule D)	
14. Contributions. (Subject to Schedule D)	
15. Other Deductions Authorized by Law (including stock determined to be worthless during taxable year). (Subject to Schedule D)	8,851.80
16. Total Deductions as shown in Items 10 to 15.	9,608.40
17. Net Income shown in Item 9.	12,473.60

BENEFICIARIES' SHARES OF INCOME AND CREDITS

(See Instruction 10)

1. Name and Address of Each Beneficiary Show relationship, if any, and credit claimed Show whether beneficiary is dead or in another collection district, specify district	2. Percentage of Income or Credit Claimed	3. Proportion of Total Income or Credit Claimed Received from Fiduciary	4. Description of Each Beneficiary Name and Address	5. Income Tax Rate of Each Beneficiary	6. Income Tax Rate of Each Beneficiary	7. Income Tax Rate of Each Beneficiary
16. Bishop Trust Co., Ltd., Executor/Trustee under the will of John A. McCandless,						
17. Deceased, Honolulu, T. H.	100	19,473.60				
18. _____						
19. _____						
20. _____						
21. _____						
22. _____						
23. _____						
24. _____						
25. _____						
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27. _____						
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ITEM 1—PROFIT (OR LOSS) FROM TRADE OR BUSINESS (See Instruction 1)

Total receipts from trade or business (state kind of business)	Other Business Expenses
Cost or Gross Sale	
2. Labor _____	10. Rentals, except "Labor" reported on Line 2 _____
3. Material and supplies _____	11. Interest on business indebtedness to others _____
4. Merchandise bought for sale _____	12. Taxes on business and business property _____
5. Other costs (Indicate below or on separate sheet) _____	13. Losses (explain in table at foot of page) _____
6. Plus inventory at beginning of year _____	14. Bad debts arising from sales _____
7. Total (Lines 3 to 6) _____	15. Depreciation, obsolescence, and depletion (see plan to table provided at foot of page) _____
8. Less inventory at end of year _____	16. Rent, repairs, and other expenses (estimate low or on separate sheet) _____
9. Net Cost or Gross Sale (Line 7 minus Line 8) _____	17. Total (Lines 10 to 16) _____

Enter "C", or "C or M", on Lines 6 and 8 to indicate whether the securities are valued at cost, or cost or market, whichever is lower.

ITEM 8—INCOME FROM RENTS AND ROYALTIES (See Instruction 8.)

L. Name of Property	S. Amount Received	E. Direct or Value as on March 1, 1944 Borrower's Estimate	F. Increases or Decreases during last year	G. Current Estimate (Estimate from E)	H. Net Present (Estimate from G)

Explanation of deviations shown in Column 5

IN MEDICAL C-CAPITAL GAINS AND LOSSES (FROM SALES OR EXCHANGES ONLY) See Instructions

(f) **Travel Grants and Expenses** (Enter net amount for item)

(d) Percentage of business related loans to all types of credit providers affecting business.

SCHEDULE D—INCOME FROM DIVIDENDS

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STATEMENT OF REBUTTAL FOR INDEMNIFICATIONS CLAIMED IN SCHEDULES A AND B

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULE C							
1 Date of Recovery (if buildings, date removed of which unoccupied)	2 Date Aug 1940	3 Date of Purchase, Value or Acquisition Price or Rent From or To Date (Indicate Period)	4 Average Field Depreciation Rate at Date of Sale	5 Depreciating Allowance for Sales and Other Losses in Prior Years	6 Exemption from Sales Taxes Under No. or Business Name	7 Date of Sale (if buildings, date sold or otherwise disposed of same) Date of Disposal of same Description of Sale	8 Depreciating Allowance for Sales and Other Losses in Prior Years

EXPLANATION OF REBATE FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE 1 AND IN ITEM 12.

EXPLANATION OF DELAY FOR EACH OF THE					
1. Kind of Payment	2. Date Received	3. Effect	4. Corresponding Deliverables	5. Implementation Activities Within	6. Corresponding Deliverables

AFFIRAXIT (See Instruction 23)

"I swear (or affirm) that this return (including its accompanying schedules and statements, if any) has been and is being, to a true, certain, and complete return, made in good faith for the accounting period stated, above named, hereunto.

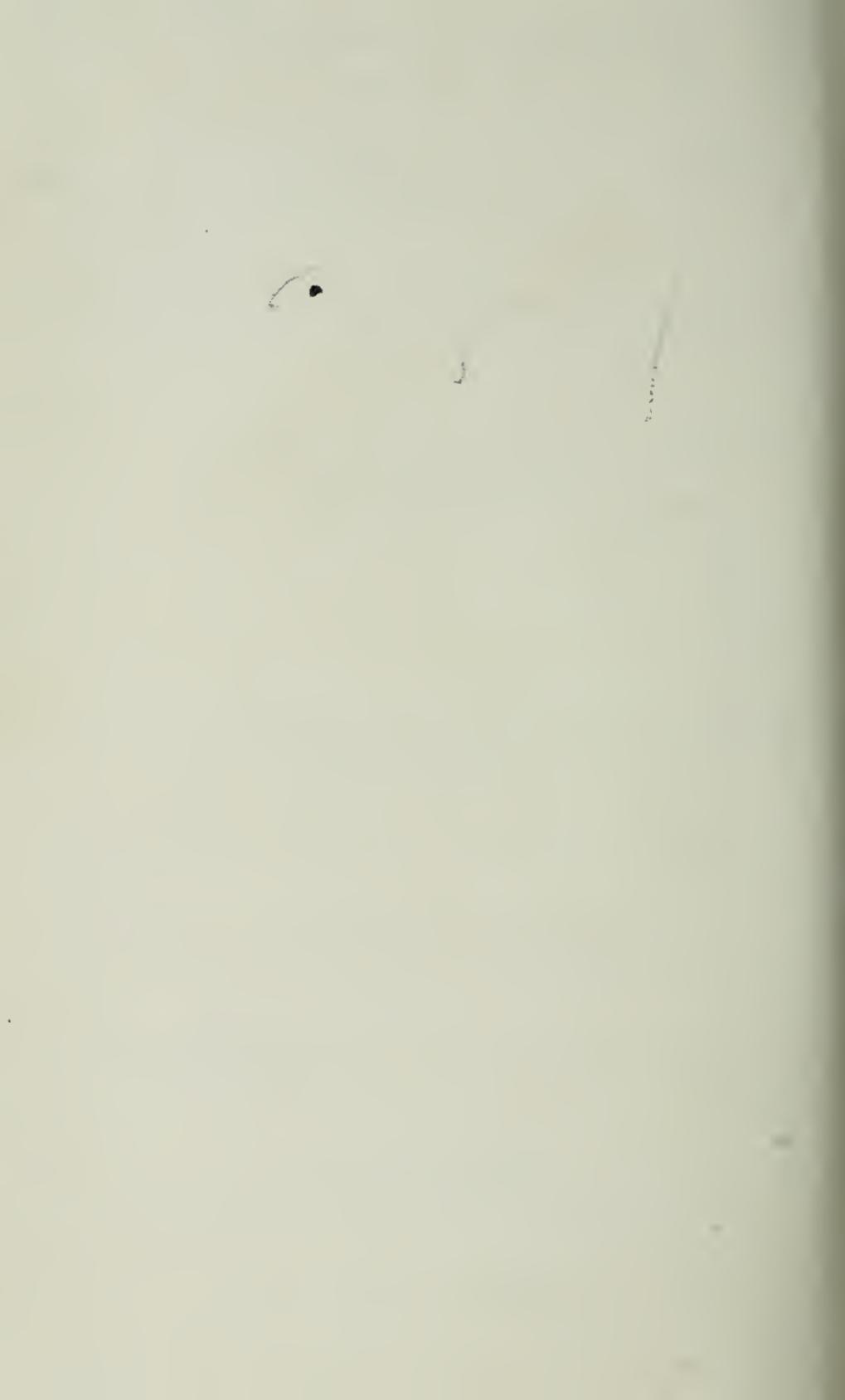
Return to and deliver to the post office at 17th day of J. J. 196

**POSTAL
MAIL** *Replies Attest* *Engaged in business forms*

I am sorry to inform that I have prepared this return in make, if any is a true, correct, and complete statement of prepared of which I have any knowledge.

AFFIDAMENTO (Cfr. INDIRIZZI 22)

I am sorry to inform that I have prepared this return for the past
months, it is a true, correct, and complete statement of all the facts
of which I have been made known.



RETURN FORM MARKED "DUPLICATE" MUST BE FILED WITH THIS ORIGINAL RETURN

U. S. DEPARTMENT
INTERNAL REVENUE SERVICE

(Auditor's Stamp)

**FIDUCIARY RETURN OF INCOME
For Calendar Year 1936**Or Period Your Return... January 1, 1936, and ended January 31, 1936File this Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year
(PRINT NAMES AND ADDRESS PLAINLY BELOW)Name of
McCandless Trust JOHN A. McCANDLESS TRUSTName and
Address of
Fiduciary
Bishop Trust Company, Ltd.Name and
Address of
Fiduciary
King and Bishop StreetsName and
Address of
Fiduciary
Honolulu, T.H.

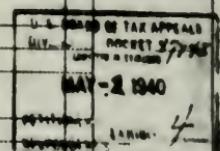
Do Not Write in These Spaces

Pa. 126
CodeSerial
Number 9532 FDate June 1937

1. Was a return of income for the prior year filed on behalf of the estate or trust named above? Yes
 2. If no, to which collector's office was it sent? (Give name or city and state) Honolulu
 3. If copy of will or trust instrument and statement required under Instruction 23 have been previously furnished, state when and with whom they were filed. Estate tax return: Collector of Internal Revenue, Honolulu, T.H.
 4. State whether books are kept on cash or accrual basis. Cash
 5. Did any person or persons advise you in respect of any question or matter affecting any item or schedule of this return, or assist or advise you in the preparation of this return, or actually prepare this return for you? Yes. If so, give the name and address of such person or persons and state the nature and extent of the assistance or advice received by you and the items or schedules in respect of which the assistance or advice was received; if this return was actually prepared by any person or persons other than yourself, state the source of the information reported in this return and the manner in which it was furnished to or obtained by such person or persons. Cameron A. Johnston Books
 6. Did you make a return of information on Forms 1096 and 1099 (see Instruction 28) for the calendar year 1935? (Answer "yes" or "no") No

INCOME

1. Net Profit (or Loss) from Trade or Business. (From Schedule A) _____
 2. Interest on Bank Deposits, Notes, and Corporation Bonds, etc. (except interest on tax-free investment bonds) _____
 3. Interest on Tax-free Covenant Bonds upon which a tax was paid at source. _____
 4. Income (or Loss) from Partnerships, Syndicates, Pools, etc., and Fiduciaries: (Name and address) _____



5. Rentals and Royalties. (From Schedule B) _____

6. Capital Gains (or Losses). (From Schedule C) _____

7. Dividends on Stock of: Estate of John A. McCandless, dec'd. 19,423.75
 (a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1934. 216.00
 (b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1934. _____
 (c) Foreign Corporations. _____

8. Other Income. (Name parts of income) _____

9. **TOTAL INCOME IN ITEMS 1 TO 8.** 19,639.75

DEDUCTIONS

10. Interest Paid. (Explain in Schedule E) _____ 1.00
 11. Taxes Paid. (Explain in Schedule E) _____ 1.00
 12. Losses by Fire, Storm, etc. (Explain in Table at bottom of page 2) _____
 13. Bad debts (including bonds determined to be worthless during taxable year). (Explain in Schedule E) _____

14. Contributions. (Explain in Schedule F) _____
 15. Other Deductions Authorized by Law (including stock determined to be worthless during taxable year). (Explain in Schedule E) _____

16. **TOTAL DEDUCTIONS IN ITEMS 10 TO 15.** 1.00

17. **NET INCOME** (Item 9 minus Item 16) 19,638.64

BENEFICIARIES' SHARES OF INCOME AND CREDITS
(See Instruction 16)

1. Name and Address of Each Beneficiary (Indicate surviving, deceased, and nonresident abroad)	2. PER- CENTAGE OF TOTAL INCOME	3. Dividends (Item 7 of above, or Prod. 17, whichever amount is smaller)	4. BALANCE OF NET INCOME (Item 17 minus Item 3 and 5)	5. Income Tax Paid at Source (7% of Item 4)	6. Income Tax Paid on Net Income (7% of Item 4)
Note - Where return of beneficiary is filed in another collection district, specify district					
(a) <u>Bishop Trust Company, Limited</u> <u>100</u> <u>19,638.64</u>					
(b) <u>Executor/Trustee under the will of</u>					
<u>John A. McCandless, deceased.</u>					
(c) <u>Honolulu, T. H.</u>					
(d) _____					
(e) _____					
(f) _____					
(g) _____					
(h) _____					
TOTAL			19,638.64		

NONTAXABLE OBLIGATIONS, LIBERTY BONDS, ETC.

(See Instruction 18)

- (a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia, or United States possessions _____
 (b) Obligations issued under the provisions of the Federal Farm Loan Act, or under such act as amended _____
 (c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917 _____
 (d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness _____
 (e) Liberty 4% and 5% Bonds, U. S. Savings Bonds, and Treasury Bonds _____
 (f) Savings Bonds _____

SCORING A—PROFIT OR LOSS FROM TRADE OR BUSINESS (See Instruction 1.)

3. Total average Gross Sales or business (What kind of business Over or Gross Sales)			Gross Business Discrepancy	
4. Expenses		10. Salaries, except "Labor" reported on Line 2.		
5. Materials		11. Interest on business indebtedness to others.		
6. Merchandise bought for resale		12. Taxes on business or on business property.		
7. Unfinished business between beginning and end of year		13. Losses (apply in table at foot of page).		
8. Net inventory at beginning of year		14. Bad debts arising from sales.		
9. Taxes (Lines 3 to 8)		15. Depreciation, obsolescence, and depletion (apply in table provided at foot of page).		
16. Less inventory at end of year		16. Rent, repairs, and other expenses (including taxes levied on or corporate assets).		
17. Net Over or Gross Sales (Line 7 minus Line 16)		17. TOTAL (Lines 10 to 16)		
18. Enter the amount of Line 17 in Lines 3 and 5 to indicate whether income or loss was greater than in Line 1, whichever is lower.		18. Total Discrepancy (Line 8 plus Line 17)		
		19. Net Profits (or Loss) (Line 1 minus Line 18) (Enter as Item 1)		

CONTINUE TO RECEIVE NEWS AND REVIEWS FROM THE INSTITUTE

SCHEDULE B - INCOME FROM RENTS AND ROYALTIES (See Instruction B)						
1. Name of Person	2. Amount Received	3. Cost or Value of or Market L. 1950, Minnesota Goods	4. Description (Explain in table at foot of page)	5. Receipts	6. Other Expenses (Amounts below)	7. Net Profit (Gains or Losses)

EXHIBIT B-CAPITAL GAINS AND LOSSES FROM SALES OF EXCHANGES OF D

10.7(a) Capital losses (Take not account of Item 8). (Capital losses are allowable only to the extent of \$2,000 plus capital gains). Is

EXHIBIT E D-INCOME FROM DIVIDENDS

John A. McCandless & Co., Ltd.

Schedule attached

SCROLL 2—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 10, 11, 12, 14, AND 15

Dividend excise tax, \$400.12 Income commissions 34044.22
Professional services 2925.00 Traveling expenses 1855.76
Sundries 29.92 \$8551.50

ITEMS AND AMOUNTS OF DEPRECIATION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

EXPLANATION OF DEDUCTION FOR LOSS						
1. END OF PREVIOUS YEAR OR DATE ACQUIRED IF NOT OWNED WHOLE TIME	2. DATE ACQUIRED	3. COST OR MARK-UP, VALUE IF ACQUIRED THROUGH TO DATE (See Column 6 and 7)	4. AMOUNT PAID DEPARTMENTED IN USE AT END OF YEAR	5. DEPRECIATION ALLOWED (OR ALLOW- ABLE) FOR YEAR	6. RECOVERED COST OR OTHER BASIS TO BE REBATED	7. LOSS TAKEN IN ACCORDANCE WITH DEPARTMENT REGS

— 7 —

AFFIDAVIT (See Instructions 23)

Present to and acknowledged before me on 14th day of Feb., 1936.

before May 14 day
Bush Street

Director of Survey of India's Hydrographic Survey

AFTIRAYIT (See Instruction 25)

*(If we answer to affirm) that I/we prepared this return for the person named herein and that the return (including its accompanying schedules and state
ments, if any) is a true, correct, and complete statement of all the information respecting the income tax liability of the person for whom this return has been
prepared of which I/we have any knowledge.*

Present to and witnessed before me this day of 193.

(Signed list of persons participating the protest)

position of protein processing sites.

(Petitioner's Exhibit No. 4 continued)

ESTATE OF JOHN A. McCANDLESS, DECEASED.

1935-36

Dividends

	Taxable	Exempt
Honolulu, T. H.		
Alexander & Baldwin, Ltd.....	\$ 2,000.00	
Bank of Hawaii.....	1,524.00	
Bishop Trust Co., Ltd.....	31.25	
C. Brewer & Co., Ltd.....	3,672.00	
Ewa Plantation Co., Ltd.....	1,200.00	
Home Insurance Co. of Hawaii, Ltd.	1,800.00	
Inter-Island Steam Navigation Co., Ltd.	2,380.00	
John A. McCandless & Co., Ltd.		
Distributed		\$49,111.20*
Undistributed (Section 351).....		4,058.00
McCandless Building Co., Ltd.....	2,188.80	
Oahu Sugar Co., Ltd.....	7,750.00	
Pioneer Mill Co., Ltd.....	7,667.00	
Waialua Agricultural Co., Ltd.....	720.00	
San Francisco, Calif.		
Pacific Gas & Electric Co.....	99.04	
	<hr/>	<hr/>
	\$31,032.09	\$53,169.20

*Paid out of capital; see statement attached.

[47]

JOHN A. McCANDLESS & COMPANY, LIMITED

Form 1096 1935

Surplus

12/31/30, balance	\$185,280.70
1931 net income, deficiency letter, 6/21/35, IT:	
AR:E-7-8, RTM-60D	292,874.19
Dividends received	201,608.70
	<hr/>
	679,763.59
Deduct Dividends paid, 1931.....	\$129,324.37
Undistributed income re	
104(d)	331,537.70
Federal income tax.....	20,957.78
	<hr/>
	481,819.85

12/31/31, balance,	197,943.74
Net loss, 1932, as finally determined by Commissioner	194,248.21

	3,695.53
Dividends received	78,700.00

	82,395.53
Deduct Dividends paid	47,841.00
Federal income tax.....	27,540.38

12/31/32, balance	7,014.15
Net loss, 1933, per return (short form RAR)	100,211.17

	93,197.02
Dividends received	73,613.78
Refund Federal income tax	5,889.31

	13,693.93
Deduct dividends paid	80,166.00

12/31/33, deficiency	93,859.93
Net loss, 1934, per return.....	9,537.31
Excess of stock loss over amount de- ductible in return \$5,294.79—\$2,000.00	3,294.79

	106,692.03
Dividends received	49,463.57

	57,228.46
Deduct dividends paid	42,669.00

12/31/34, deficiency,	99,879.46
Net profit, 1935, per return.....	3,476.14
Dividends received	63,494.18
Liquidating dividend, 1934.....	21.00

	32,906.14
Deduct dividends paid.....	49,134.00

12/31/35, deficiency	\$ 82,040.14

PETITIONER'S EXHIBIT NO. 5

Know All Men by These Presents:

That I, John A. McCandless, whose domicile and legal residence is Honolulu, City and County of Honolulu, Territory of Hawaii, being of sound and disposing mind and memory and not in anywise acting under any undue influence, duress, menace or fraud exerted toward me whatsoever, do hereby make, publish and declare this my Last Will and Testament, hereby revoking all other wills or codicils by me heretofore made.

First: I direct my Executor to pay all of the expenses incident to my last illness, funeral and testamentary expenses, and all of my just debts.

Second: I direct my Executor to pay to my wife, Stella Hymson McCandless, the sum of One Thousand Dollars (\$1,000.00) per month for her support and maintenance during the administration of my estate, the first of such payments to be made one (1) month from the date of my death and succeeding payments of like amount to be made on the same day of each succeeding month until such time as my residuary estate has been distributed to my Trustee.

Third: I direct my Executor to pay the sum of Two Hundred Fifty Dollars (\$250.00) per month to each of my grandchildren, James C. McCandless, John McCandless Hepburn, Ella Margaret Hepburn and Frances Madge Hepburn, for their respective support, maintenance and education during the administration of my estate, the first of such payments

to be made one (1) month from the date of my death, and succeeding payments of like amount to be made on the same day of each succeeding month until such time as my residuary estate has been distributed to my Trustee. During the period of time that any of my said grandchildren are minors such monthly payments shall be made by payment to the [(Sgnd) JOHN A. McCANDLESS] [49] natural guardian of such minor grandchild, and the receipt of such natural guardian shall be a sufficient receipt, release and discharge to my said Executor.

Fourth: I give and bequeath the sum of Ten Thousand Dollars (\$10,000.00) to each of the following persons: to my nephew R. Lee Barnes, of Ellensburg, Washington; to my niece Mary O'Brien Hardigg, whose mother's home is Parkersburg, West Virginia; to Mary Ann Pettigrew, the daughter of Evelyn O'Brien, deceased, of Parkersburg, West Virginia; to my sister Anna O'Brien, of Parkersburg, West Virginia; and to my gardener Victor Jacks, provided, however, as a condition to said bequest to Victor Jacks that he is still in my employ at the time of my death.

Fifth: I give and bequeath the sum of Ten Thousand Dollars (\$10,000.00) to each of the following persons: to my brother James S. McCandless; to my brother Lincoln Loy McCandless; to my son-in-law H. M. Hepburn; to Mrs. H. M. Hepburn, wife of H. M. Hepburn; to Jessica McCandless, wife of my brother Frank McCandless, of Tacoma, Wash-

ington; and to Marion Rodolph Ghiradelli, widow of my deceased son.

Sixth: I give and bequeath unto The Imperial Council of the Ancient Arabic Order of the Nobles of the Mystic Shrine for North America, a Corporation owning, operating and conducting the "Shriners' Hospitals for Crippled Children", the sum of One Hundred Thousand Dollars (\$100,000.00), to be invested in such securities as directed by the Board of Trustees of the Shriners' Hospitals, or their successors in office, the income of which shall be used for the operation and maintenance of the "Shriners' Hospitals for Crippled Children".

Seventh: I give, devise and bequeath to my wife, Stella Hymson McCandless in fee simple our home, being the house and lot on Thurston Avenue, Honolulu, and described in Owner's Transfer Certificate of Title No. 388 issued to me, John A. McCandless, together with all household furniture, stores, furnishings, fixtures, [(Sgnd) JOHN A. McCANDLESS] [50] plate, china, linen, paintings, books, statuary, works of art and other articles of household or domestic use or ornament situate thereon or therein.

Eighth: I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situated and of every kind or nature, and any property over which I shall possess any power of appointment, to Bishop Trust Company, Limited, an Hawaiian corporation, in trust for the uses and purposes and with the powers as hereinafter stated, that is to say:

(a) My said Trustee shall receive, hold, manage and control my said trust estate, collect the income therefrom and pay all charges incident to trust estates and properly payable by my said trust estate therefrom, and I authorize my Trustee to retain, either permanently or temporarily or for such period as to it may seem expedient, any investment made or property held by me, of whatever nature, and I direct that my said Trustee and Advisors to my Trustee hereinafter mentioned shall not be held liable for any loss resulting to my trust estate by reason of my Trustee retaining any such investment or property, or by reason of my trustee making or keeping any investment authorized to be made in this my Will, or for any error of judgment in this respect.

(b) I authorize and empower my Trustee to sell at public or private sale, partition, exchange or otherwise dispose of the whole or any part of the real estate which may be from time to time a part of my trust estate, with power to accept any purchase money mortgage or mortgages for any part of the purchase or exchange price; also to lease or let for any term of months or years, alter, repair or improve or develop the same or any part of the same, or otherwise provide for the use or employment of the same as to it may seem for the best interests of my said trust estate, any [(Sgnd) JOHN A. McCANDLESS] [51] such lease to be valid for the full term thereof notwithstanding that the trust herein created may sooner terminate, and

all this upon such terms, agreements, contracts or conditions and for such consideration as to my Trustee and the two Advisors hereinafter mentioned shall seem fit and proper, and all of these powers shall be exercised by my Trustee without the necessity of my Trustee receiving the approval or order of any court or courts authorizing the same; but these powers shall only be exercised by my Trustee when the transaction contemplated has been agreed to in writing or by cable by my Trustee and by the two Advisors to my Trustee mentioned in paragraph "Ninth" herein.

(c) I authorize and empower my Trustee to sell, lease, transfer or exchange any mixed property or personal property, (except capital stock of John A. McCandless & Company, Limited,) which from time to time may be a part of my said trust estate, and to invest the proceeds of any property, real, personal or mixed, and also any unapplied income of my said trust estate, and to reinvest the same, and in investing and reinvesting any proceeds, money or unapplied income of my said trust estate, my said Trustee shall invest the same (except for the mortgage or mortgages provided in (b) above as receivable as part of the sale price of real estate, but the proceeds of any such mortgage shall be invested as provided in this sub-paragraph (c) in common stocks of corporations and/or in United States Government bonds and/or in official bonds of the Territory of Hawaii, but I direct that my Trustee shall not acquire by purchase additional

sugar stocks as I feel that my trust estate will commence with sufficient ownership of that class of investments; my Trustee shall also have power to sell and dispose [(Sgnd) JOHN A. McCANDLESS] [52] of any stocks of corporations, bonds or other personal or mixed property which may be a part of my said trust estate from time to time, but in investing or in reinvesting the proceeds thereof my Trustee shall purchase securities of the classes hereinbefore mentioned in this sub-paragraph (c) for purchase; and all this upon such terms, agreements, contracts or conditions and for such consideration as to my Trustee and the two Advisors herein mentioned shall seem fit and proper, and all of the powers given my Trustee in this sub-paragraph (c) shall be exercised by my Trustee without the necessity of my Trustee receiving the approval or order of any court or courts authorizing the same. My said Trustee shall have the right and power to vote either directly or by proxy the stock of any corporation that may be a part of my said trust estate from time to time at all meetings of stockholders as it may deem best, but my said Trustee shall not buy, sell, lease or exchange any personal property or mixed property belonging to my trust estate unless the transaction contemplated had been agreed to in writing or by cable by my Trustee and by the two Advisors to my Trustee mentioned in paragraph "Ninth" herein.

(d) I direct that all stock dividends upon any stock owned by my said trust estate shall be con-

sidered and treated as capital and not as income of my said trust estate, and aside from the foregoing exception I give to my Trustee full power and authority to determine in doubtful cases what property or moneys received by it as my Trustee is capital and what is income, and all beneficiaries shall be bound by the decision and determination of my Trustee in regard to such allocation between capital and income. [(Sgnd) JOHN A. McCANDLESS] [53]

(e) My said Trustee shall pay and deliver from the accumulations and net income of my said trust estate, the sum of One Thousand Dollars (\$1,000.00) per month to my wife, Stella Hymson McCandless, the first of such payments to be made one month after the last monthly payment of One Thousand Dollars (\$1,000.00) is made by my Executor to my said wife in accordance with the provisions of paragraph "Second" herein, and succeeding payments of like amount to be made to my said wife on the same day of the month of each succeeding month, until my eldest grandchild, John McCandless Hepburn, shall attain the age of twenty-one (21) years, or if he shall die before attaining such age, then until the time he would have attained the age of twenty-one (21) years if living, and at such time the payment of One Thousand Dollars (\$1,000.00) per month to my said wife hereinbefore provided shall cease and determine, and from and after such time I direct my trustee to pay to my said wife Stella Hymson McCandless one tenth (1/10) of the

annual net income thereafter received in my said trust estate, in quarterly payments or oftener, from time to time, as in the sole discretion of my trustee shall seem best.

(f) My said Trustee shall pay and deliver from the accumulations and net income of my said trust estate, the sum of Two Hundred Fifty Dollars (\$250.00) per month to each of my said four (4) grandchildren, James C. McCandless, John McCandless Hepburn, Ella Margaret Hepburn and Francis Madge Hepburn, the first of such payments to be made one (1) month after the last monthly payment of Two Hundred Fifty Dollars (\$250.00) is made by my Executor to my said grandchildren in accordance with the provisions of paragraph "Third" herein and succeeding payments of like amount to be made on the same day of each succeeding month, and such payments shall continue [(Sgnd) JOHN A. McCANDLESS] [54] to each such named grandchild until such grandchild shall attain the age of twenty-one (21) years, and all such monthly payments shall be made by payment to the natural guardian of such minor grandchild, and the receipt of such natural guardian shall be a sufficient receipt, release and discharge to my said Trustee. As my said grandchildren attain the age of twenty-one (21) years the payment of Two Hundred Fifty Dollars (\$250.00) per month to said grandchild attaining the age of twenty-one (21) years shall cease and determine, and from and after such time I direct my Trustee to pay to each said

grandchild from and after his or her attaining the age of twenty-one (21) years one-tenth (1/10) of the annual net income thereafter received in my said trust estate, in quarterly payments or oftener from time to time as in the sole discretion of my Trustee shall seem best. If any of my said grandchildren shall die before the termination of this trust, leaving issue surviving, then and in such event such issue shall be paid the monthly payments and the share of the net income to which his or her parent would have been entitled if such parent were living. If any of my said grandchildren shall die before the termination of this trust, leaving no issue surviving, then and in such event my said wife and the survivors of my said grandchildren and the issue, if any, of my said grandchildren who are then dead (such issue, however, taking the share his or her parent would have been entitled to if living) shall be paid in equal shares, the monthly payments and the share of the net income to which said grandchild deceased without issue would have been entitled if surviving. [(Sgnd) JOHN A. McCANDLESS] [55]

(g) In the event of any emergency arising, whether from illness, necessity for hospital or surgical care, or any other emergency of any kind or sort which my said Trustee in its sole discretion may consider vitally affecting the welfare of my said wife or all or any of my said grandchildren, or if my said Trustee shall decide that it is necessary or useful to provide for further education for any

or all of my said grandchildren, then and in any such event, and as often as the same shall occur, my said Trustee is hereby authorized to pay out of the accumulation and income of my said trust estate a larger sum than One Thousand Dollars (\$1,000.00) per month to my wife, Stella Hymson McCandless, or a larger sum than Two Hundred Fifty Dollars (\$250.00) per month to any or all of my said grandchildren, as the case may be, in order to suitably provide for any such emergency or condition, and the decision of my said Trustee as to the existence of such emergency or condition, and the necessity for an additional payment and the additional amount to be paid, if any, from time to time, and the time for the continuance of any such additional payment or payments shall be final. It being my intent and desire by this provision to authorize my Trustee to provide for any emergency or condition affecting the welfare of my said wife or any or all of my said grandchildren by providing additional payments if, as and when in the sole discretion of my said Trustee said additional payments are necessary or desirable in view of the circumstances then existing. Any additional payments so made by my said Trustee to provide for any such emergency or condition shall not be chargeable against the interest in my said trust estate of the beneficiary or beneficiaries for whom said additional payment or payments are made, but any and all such payment or payments shall be treated as

ordinary expenses of [(Sgnd) JOHN A. McCANDLESS] [56] my said trust estate.

(h) Any of the net income of my said trust estate which is not paid out to the beneficiaries from time to time during the continuance of the trust in accordance with the terms of my Will shall be retained in my said trust estate and the same shall be invested and reinvested and accumulated until this trust shall terminate.

(i) When the youngest of my said grandchildren shall attain the age of thirty (30) years, or in the event that my said youngest grandchild shall die before attaining such age, then at such time as my said youngest grandchild would, if living, attain the age of thirty (30) years this trust shall cease and determine and my Trustee shall thereupon transfer and deliver all of my said trust estate (that is, the capital thereof with all accumulations of income as invested or reinvested, and any other undistributed income and all the assets of every kind and sort then a part of my said trust estate) free and clear from any trust, in equal shares, that is one-fifth (1/5) each, to my wife, Stella Hymson McCandless, and my said four grandchildren, James C. McCandless (posthumous child of my son James Crystal McCandless, born of his wife Marion, now the wife of Louis Ghiradelli), John McCandless Hepburn, Ella Margaret Hepburn and Frances Madge Hepburn, but, should any of my said four grandchildren die prior to the termination of this trust, leaving issue surviving at the time of distribu-

tion, the share of my said trust estate provided to be distributed to any such deceased grandchild shall go to and be distributed to the issue then surviving of said grandchild, such share to be equally divided between such issue per stirpes and not per capita. [(Sgnd) JOHN A. McCANDLESS] [57] Should any of my said four grandchildren die prior to the termination of this trust, leaving no issue surviving at the date of termination of this trust, then the share of my said trust estate provided to be distributed to any such grandchild shall go to and be distributed to my said wife, if she be then surviving, and to each of the survivors of said grandchildren, and to the issue who are then surviving of any said deceased grandchild (such issue, however, to take only the share to which his or her parent would have been entitled had such parent been surviving at the date of distribution, and such share to be equally divided between such issue, per stirpes and not per capita) in equal shares.

If my said wife, Stella Hymson McCandless, be not living at the termination of this trust, or in the event that she shall not be entitled to take under my Will as provided in paragraph "Tenth" hereof, then and in any of such events, my said trust estate shall be distributed to each of the survivors of my said four grandchildren and to the issue surviving at the time of distribution, of any of my said grandchildren who have died prior to the time of distribution, (such issue who are then surviving of any said deceased grandchild to take only the

share to which his or her parent would have been entitled had such parent been surviving at the date of distribution, and such share to be equally divided between such issue, per stirpes and not per capita) in equal shares.

Ninth: I hereby appoint as Advisors to my Trustee and as Advisors to my Executor under this Will John L. McNabb, of San Francisco, California, and Urban E. Wild, of Honolulu, Territory of Hawaii, for the purpose of consultation with my Trustee and with my Executor in regard to the buying and [(Sgnd) JOHN A. McCANDLESS] [58] selling of securities and other property belonging to my estate or belonging to my trust estate, and I direct that no securities or other personal property or mixed property shall be either purchased, sold and/or exchanged by my Executor or by my Trustee, and no real estate shall be sold, exchanged or leased by my Executor or by my Trustee without the unanimous consent of said Advisors or their successors.

This provision I insert as a check on hasty or inconsiderate sales or investments, and the authority of said Trustee and of said Executor is general and complete under this Will save with respect to this limited power of consultation and agreement by the said two Advisors named in this Will.

In the event of the death or refusal to act of either of the foregoing Advisors named in this paragraph, or their successors, I direct that the successor or successors to such Advisor shall be such

qualified person as is selected and designated in writing as Advisor by the then Chief Justice of the Supreme Court of the Territory of Hawaii, and upon such designation of a successor, the equity court having jurisdiction of my trust estate shall by formal order appoint the person so selected and designated as Advisor hereunder. My Advisors shall be entitled to receive adequate and full compensation so as to be warranted in giving careful and adequate time, attention and study to the same, and such compensation shall be an expense of my estate or trust estate as the case may be and chargeable to income.

Tenth: I have in this my Last Will and Testament made provision for various payment from and bequests or devises and interests in my estate and in my said trust estate [(Sgnd) JOHN A. McCANDLESS] [59] to my wife, Stella Hymson McCandless. I have every reason to believe that our life will be, as now, affectionate and harmonious. But knowing the occasional uncertainties of married life, I make every bequest and provision in my Will for her benefit conditional on the fact that my said wife and I are at the time of my death married and living together as husband and wife, but should we, at the time of my death, be separated or not be living together as husband and wife, then any rights and interests given by this my Last Will and Testament to my said wife shall not take effect but shall be void and of no effect, and in any of such events my said wife, Stella Hymson McCandless, shall take nothing under this Last Will and Testament.

Eleventh: I hereby appoint my personal attorneys, John L. McNabb and Urban E. Wild, attorneys for my Trustee and Executor herein named, and direct that such Trustee and Executor employ my said attorneys to act as attorneys for the Trustee and Executor of my estate.

Twelfth: I hereby nominate and appoint Bishop Trust Company, Limited, an Hawaiian corporation, Executor of this my Last Will and Testament, and I direct that no bond shall be required from said Bishop Trust Company, Limited, either as Trustee or as Executor hereunder.

Thirteenth: My Executor shall in its discretion be empowered to keep open the administration of my estate for such length of time as may seem necessary to my Executor to best protect the interests of my estate. It is my express desire that no part of my estate shall be sacrificed because of the sale of assets thereof at an inopportune time in order to pay debts or expenses of administration or duties or taxes or any other charge or claim against my estate. My executor is hereby authorized to pay all legacy, inheritance, transfer [(Sgnd) JOHN A. McCANDLESS] [60] or other duties or taxes upon my estate or upon any interest in my estate from the income from my estate and/or from the capital thereof or partially from income and partially from capital thereof, which shall seem to my said Executor to be to the best interests of my estate as a whole.

My Executor is hereby given the express power to sell real estate of my estate or lease or let the same if such course is deemed advisable by my Executor before selling any personal property of my estate. My Executor shall make no sale or lease of real estate or securities or other personal property, however, without the agreement and consent in writing or by cable of the two Advisors to my Executor herein mentioned in paragraph "Ninth". I hereby authorize my Executor to borrow money from time to time upon the security of any of the assets of my said estate for the purpose of securing the necessary funds with which to pay any such legacy, inheritance, transfer or other duties or taxes upon my estate or upon any interest in my estate, or to pay debts of my estate or to pay any other charges against my estate or for the purpose of financing my estate for any other reason, if it shall seem necessary or advisable to my Executor so to do. If any such money is so borrowed I authorize my Executor to repay the same either from income or from capital or partially from income and partially from capital as to my said Executor shall seem best under the circumstances.

Fourteenth: I direct that the bequests made in paragraph Fourth, Fifth and Sixth of this Will are to be paid to the various legatees as soon as my Executor shall be able so [(Sgnd) JOHN A. McCANDLESS] [61] to do without embarrassment to my said estate, having due consideration to the many payments required for inheritance taxes, es-

tate taxes, etc., and for debts and charges and for other purposes, and I further direct that none of said bequests shall draw interest, and that when paid each of said bequests shall be paid in full by payment of the net amount herein *bequeathed* in each case.

Fifteenth: I hereby declare that I am, at the time of making this Will, married to Stella Hymson McCandless, by whom I have no children at this time; that I am and have been the father of three children and no more, by a former marriage, to-wit, a son Charles, who died in infancy and is buried in the Thompson family lot at Parkersburg, West Virginia, a son, James Crystal McCandless, and a daughter, Frances Madge Hepburn; those three children and my former wife, Ella T. McCandless, mother of said children, are all dead.

I further declare that I have no other children and never have had any other children than the three children herein named, and my nearest descendants are my said four grandchildren named in this Will. I make this statement in view of the fraudulent claims which are so frequently advanced after death against the estates of men of wealth. Any claim by any other person to be a child or grandchild of mine, (unless a child shall be hereafter born of my present marriage,) would be false and fraudulent, and as a matter of protection to my estate and to nullify any fraud which might be attempted against my estate, as has been attempted against other estates, I hereby devise and

bequeath to any other person claiming to [(Sgnd) JOHN A. McCANDLESS] [62] be such child or grandchild of mine, who shall assert and prove the relationship of child or grandchild, the sum of Ten Dollars (\$10.00) and no more.

Sixteenth: I hereby will and direct that any heir, legatee, devisee or person interested in my estate who shall bring any contest, direct or indirect, against this Will, either in whole or in part, or who shall oppose the probate of this Will, or who shall, directly or indirectly, seek to revoke its probate, shall thereby forfeit any bequest made or interest given to such person, and I hereby expressly revoke any bequest made or other interest given to any heir, legatee, devisee or other interested person who shall take any such step in opposition to this Will or any part thereof.

Seventeenth: It is my wish that John A. McCandless & Company, Limited, shall continue to be an active and growing corporation for the benefit of my beneficiaries; that as the administration of my estate and of this trust permit, the assets of the trust be conveyed or loaned from time to time, if that seems advisable, to the John A. McCandless & Company, Limited, to the end that when this trust shall terminate, my beneficiaries shall receive, as nearly as may be, as their shares of the estate, holdings of the corporate stock of the John A. McCandless & Company, Limited. This I do to the end that my beneficiaries will become owners of interests in an active and growing corporation. And to this end,

it is my wish that no stock of the John A. McCandless & Company, Limited, shall be sold, unless necessary to protect my estate, but that that Company shall become the medium through which my estate will be distributed to my beneficiaries. [(Sgnd) JOHN A. McCANDLESS] [63]

In witness whereof I have hereunto set my hand and seal at Honolulu, T. H., this 19th day of February, A. D. 1929.

(Seal) (Signed) JOHN A. McCANDLESS

Signed, sealed, published and declared by the said John A. McCandless, as and for his last Will and Testament in the presence of us, being present at the same time, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses this 19th day of February, A. D. 1929.

(Signed) ARTHUR G. SMITH

Honolulu, T. H.

(Signed) FRIEDA H. ROBERT

Honolulu, T. H.

(Signed) SHIGEO KUSUMOTO,

Honolulu, T. H.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

(Seal) W. H. TILLY

Clerk, Circuit Court, First
Circuit, Territory of Hawaii

[Endorsed]: Petitioner's Exhibit No. 5. Admitted in evidence May 2, 1940. [64]

PETITIONER'S EXHIBIT NO. 6

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

P. No. 8077
In Probate

At Chambers

In the Matter of the Estate of JOHN A. McCAND-
LESS,

Deceased.

ORDER APPROVING ACCOUNTS, DETER-
MINING TRUST AND DISTRIB-
UTING ESTATE [65]

Whereas, Bishop Trust Company, Limited, as Executor of the Will of John A. McCandless, Deceased, did on the 12th day of January, A.D. 1935, file in the Court a Petition showing that on the 4th day of March, A.D. 1930, Letters Testamentary were duly issued to it out of and under the seal of the above entitled Court; that at all times since that time said Bishop Trust Company, Limited has been the duly qualified and acting Executor of the Last Will and Testament of John A. McCandless, Deceased; that notice to creditors of said Estate was duly made by publication in the Honolulu Star-Bulletin, a newspaper printed and published in Honolulu, T. H., for each of four (4) successive weeks (5 insertions), the first of such publications being on the 5th day of March, A.D. 1930, and that more than four (4) months have elapsed since the

first publication of said notice to creditors; that on the 24th day of May, A.D. 1930, that being within the time as extended by orders of the above entitled Court in the above entitled cause, was [66] filed a sworn inventory of all of the property and assets of every kind and nature situate in the Territory of Hawaii belonging to the above entitled Estate; that as such Executor, it has collected all sums of money known or believed to be due and collectible for said Estate; that as such Executor, it has paid all just claims against and debts of said Estate, but that said Executor had not at that time fully paid Executor's statutory commissions, expenses of administration, attorneys' fees and a claim for an additional estate tax now pending; that all the duties required by law or orders of this Court, or which a faithful and prudent appointee should do, have been performed; that on Schedules marked "A", "B" and "C", respectively, and made a part of said Petition, are shown true, full and exact statements of the receipts and expenditures for the period from February 4, 1930 to and including December 13, 1934, and an exact summary thereof: that on Schedule marked "D" and made a part of the Petition, is shown a true, full and exact statement of the remainder of the property belonging to said estate on said December 13, 1934; that Schedule "B" of said accounts shows the payment of all legacies contained in the Will of John A. McCandless, Deceased; said Petition further showed that in addition to the amounts of commission shown as paid on Sched-

ule "B" of said account, Bishop Trust Company, Limited, as such Executor, was entitled to receive a statutory capital commission in the further amount of \$42,784.52; that Bishop Trust Company, Limited had paid all federal estate taxes and all territorial inheritance taxes chargeable against the Estate of the above named decedent, which were shown to be due and payable on the respective returns filed by said Executor; that in addition to the federal estate tax heretofore [67] paid by said Executor, the United States Government has claimed an additional estate tax in the sum of \$21,819.90, and that Bishop Trust Company, Limited, as Executor of the Will of John A. McCandless, Deceased, has contested the payment of said additional tax and as such Executor has perfected an appeal to the United States Board of Tax Appeals for the purpose of determining what amount, if any, is due and payable as an additional estate tax; that Bishop Trust Company, Limited is the Trustee of the Trust Estate created under and by virtue of the Will of said John A. McCandless, Deceased, and that said Petitioner prayed that the distribution of the assets of the residuary estate remaining in its hands as such Executor be made to Bishop Trust Company, Limited, as Trustee under the Will and of the Estate of John A. McCandless, Deceased, subject to the payment of any such additional amount as may be finally determined to be due and payable for federal estate taxes, and also subject to the pay-

ment of such other amount or amounts as may finally be determined to be due and payable on account of attorneys' fees and expenses in connection with said appeal and the settlement thereof, and subject to the payment of the Executor's commission upon capital; and that upon a day appointed for the hearing of the Petition, said account be examined and allowed and that an order be made to deliver over such property as remains to the persons thereto entitled; and that Petitioner be relieved from all further responsibilities as Executor under the Will and of the Estate of John A. McCandless, Deceased.

Order to Show Cause was made returnable on the 18th day of February, A.D. 1935, at two o'clock P.M. before this Court, at Chambers, in the Judiciary Building at Honolulu, T. H., which said order further required that notice of said [68] order be given by publication in the Honolulu Star-Bulletin once a week in each of four successive weeks; that the hearing on said Petition and Account has been continued from time to time by orders of this Court to January 15, 1936, and at that time was further continued to January 17, 1936 at the hour of nine o'clock A.M.; that the above entitled Court duly appointed W. R. Onderkirk Master to examine and report on the First and Final Account of Bishop Trust Company, Limited, Executor of the Estate of John A. McCandless, Deceased, and that said Master duly made and filed his report in which he stated that he had carefully examined and checked

Schedule "A" of said Account, that being the accounting of all receipts received by the Executor, both of capital and income, and found the same correct and all receipts accounted for; that he had examined and checked Schedule "B" of said Account, that being *on account* of all disbursements made by the Executor, both of capital and income, and found all disbursements to be legally made and supported by vouchers, and called the Court's attention to the fact that the fixing of fee for attorneys must be decided by the Court. That the Master further found that all bequests and legacies had been paid in accordance with the terms of the Will of John A. McCandless and that all monthly payments directed by the Will to be made to certain beneficiaries have been made as directed; that Schedule "C", which is a summary of Schedules "A" and "B" is correct; that he had checked and examined the inventory of property in the hands of the Executor and found the same correct and all securities in the hands of the Executor. That the Master recommended that the Estate should be kept open for such length of time as might seem necessary to the Executor until such time as the Estate was in funds to [69] pay the balance of Executor's commissions, attorneys' fees, etc.

That on, to-wit, January 13, 1936, Bishop Trust Company, Limited, as such Executor, filed a Submission of Supplement to First and Final Account of Bishop Trust Company, Limited, Executor of the Will of John A. McCandless, Deceased, cover-

ing the period from and including December 14, 1934, to and including December 31, 1935; that on Schedules "A", "B" and "C", annexed to said Submission of Supplement to First and Final Account of Bishop Trust Company, Limited, Executor, is exhibited and shown a true, full and correct account of all receipts and expenditures made by, for and on behalf of said Estate for the period from and including December 14, 1934, to and including December 31, 1935, and also a summary thereof, and also on Schedule "D" is shown a true, full and correct inventory of all property remaining in its hands as Executor on December 31, 1935.

That on January 17, 1936, at nine o'clock A.M., the hearing on the said Petition and said First and Final Account and upon the Submission of Supplement to First and Final Account, and said Account for the period December 14, 1934 to December 31, 1935, came on for hearing before the above entitled Court, at Chambers, in Probate, in the Judiciary Building at Honolulu, T. H., at which time and place, upon due proof of the publication of said order of hearing in the manner and for the time therein specified and upon due proof that Bishop Trust Company, Limited has faithfully discharged the duties of its trust according to law and the orders of this Court, and that Schedules "A", "B" and "C" of First and Final Account of Bishop Trust Company, Limited, Executor of the Will of John A. McCandless, Deceased, are true and correct, which the [70] Court finds as a fact; and that

the inventory annexed thereto is correct as of December 13, 1934, which the Court finds to be a fact; and that Schedules "A", "B" and "C" of the Supplement to First and Final Account of Bishop Trust Company, Limited, Executor of the Will of John A. McCandless, Deceased, covering the period from and including December 14, 1934 to and including December 31, 1935 are true and correct statements of the receipts and expenditures during said period of time and of the respective balances thereof; and that the inventory, Schedule "D", annexed thereto is a true and correct inventory of the assets remaining in the hands of the Executor on December 31, 1935, all of which the Court finds as a fact; and the Court being advised in the premises and having considered the matter upon the record in the cause, the Master's report and the evidence adduced, the Court finds that each of the allegations of fact contained in said Petition is true; that said First and Final Account is true and correct in all particulars; that said Supplement to First and Final Account for the period from and including December 14, 1934, to and including December 31, 1935, is true and correct in all particulars; and that said First and Final Account and said Supplement to First and Final Account should each be allowed and approved; and that the inventories attached to each of said Accounts is a true and correct inventory of the assets remaining in the Estate of John A. McCandless, Deceased, as of the closing dates of said Accounts;

And it further appearing to the Court that the Estate has been administered most excellently and that it was necessary for the Executor to keep open the administration of the Estate for the full period of time that the same was open so that expenses of administration, etc. could be paid out [71] of income so as to avoid the injudicious sale of assets of the Estate at a time considered inadvisable by the Executor to make such sale; and the Court having considered the question of attorneys' fees to be allowed to John L. McNab of San Francisco, California, and Urban E. Wild, a member of the legal partnership of the firm of Smith, Wild, Beebe & Cades of Honolulu, T. H., the Attorneys for the Estate named as such in the will of John A. McCandless, deceased, and evidence having been adduced at the hearing concerning the amount to be awarded as an attorneys' fee, and the Court being advised in the premises;

And it appearing to the Court that said Accounts should be approved and allowed, that Bishop Trust Company, Limited should be ordered to transfer and deliver all property remaining in its hands as such Executor, after the payment of the amounts hereinafter mentioned, to Bishop Trust Company, Limited, Trustee under the Will and of the Estate of John A. McCandless, Deceased, subject to the payment of additional estate taxes and inheritance taxes, if any, and the probate estate should be finally closed;

And it being represented to the Court by Mr. Ernest K. Kai, representing the Treasurer of the Territory of Hawaii, that an additional inheritance tax is due and payable by the Estate in the sum of \$1,137.50, and it being impossible until this date to determine the amount of the additional inheritance tax because it depended upon the findings of this Honorable Court,

The Court finds, orders and decrees that the additional amount of \$1,137.50 is due and payable by the Estate to the Territory of Hawaii on account of additional inheritance [72] tax and that interest shall be paid to the Territory of Hawaii upon such additional tax at the rate of seven per cent (7%) per annum instead of at the rate of ten per cent (10%) per annum;

Now, therefore, it is hereby ordered, adjudged and decreed that said First and Final Account of Bishop Trust Company, Limited, Executor of the Will of John A. McCandless, Deceased, for the period from February 4, 1930, to and including December 13, 1934, and said Supplement to First and Final Account of Bishop Trust Company, Limited, Executor as aforesaid, covering the period from December 14, 1934, to December 31, 1935, be and the same are hereby approved, allowed and settled; and that said Bishop Trust Company, Limited be and it is hereby authorized, empowered, ordered and directed to forthwith deliver over to Bishop Trust Company, Limited Trustee under the Will and of

the Estate of John A. McCandless, Deceased, all properties and amounts of money remaining in its hands as such Executor, and that said property in the hands of such Trustee shall be subject as is provided by law to the claims of the United States Government for additional estate taxes, if any, and also additional income taxes, if any.

It is further ordered, adjudged and decreed after full hearing thereon, that John L. McNab of San Francisco, California, and Urban E. Wild and the firm of Smith, Wild, Beebe & Cades, of which he is a member, are hereby allowed an attorneys' fee in the sum of Seventy-Five Thousand Dollars (\$75,-

[73]

000.00), which the Court, from the evidence adduced, finds as a fact to be a very reasonable fee, and this fee includes not only services as Attorneys-at-Law but also compensation to the said John L. McNab and the said Urban E. Wild for acting as Advisors to the Executor of the Will of John A. McCandless, Deceased, in accordance with the provisions contained in said Will.

It is further ordered, adjudged and decreed that Bishop Trust Company, Limited, as such Executor, shall pay to John L. McNab the sum of \$920.00 for steamer fare for three round trips from San Francisco to Honolulu, which trips were made in connection with the affairs of the Estate of John A. McCandless, Deceased, and were necessary expenses for which the said John L. McNab has not as yet been reimbursed, and that in addition, John L. Mc-

Nab be allowed his hotel expenses on his present trip to Honolulu.

It is further ordered, adjudged and decreed that Bishop Trust Company, Limited, shall forthwith upon the signing of this Order, convey, transfer and deliver to Bishop Trust Company, Limited, as Trustee under the Will and of the Estate of John A. McCandless, Deceased, the assets remaining in its hands as Executor aforesaid; and that upon the filing herein of due and proper vouchers showing the receipt by Bishop Trust Company, Limited, as Trustee under the Will and of the Estate of John A. McCandless, Deceased, of the assets remaining in the hands of Bishop Trust Company, Limited, as such Executor, Bishop Trust Company, Limited, be discharged from its trust as Executor of the Will of John A. McCandless, Deceased, in all particulars, except that Bishop Trust Company, Limited shall remain as such Executor for such time as may be [74] necessary to secure a substitution of itself, as Trustee as aforesaid, as Party-Petitioner in the two appeals before the United States Board of Tax Appeals against the Commissioner of Internal Revenue now pending, so that said appeals may be properly presented and settled; and when said substitution has been effectuated, then and upon the filing herein of a verified statement by such Executor showing the same, Bishop Trust Company, Limited shall be discharged as such Executor in such particulars without any further order being entered by the Court.

Dated: Honolulu, T. H., this 21st day of January, 1936.

N. D. GODBOLD (Sgd.)

Judge of the Circuit Court of the First Circuit.

Attest:

(Seal)

(S) JAMES K. TRASK

Clerk of the Circuit Court of the First Circuit.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

(Seal)

W. H. TILLY,

Clerk, Circuit Court, First District, Territory of Hawaii.

[Endorsed]: First Circuit Court, Territory of Hawaii. Filed Jan. 21 PM 302. James K. Trask, Clerk.

[Endorsed]: Petitioner's Exhibit No. 6. Admitted in evidence May 2, 1940. [75]

PETITIONER'S EXHIBIT NO. 7

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

P. No. 8077

At Chambers

In the matter of the Estate of John A. McCandless,
Deceased.

FINAL RECEIPT

Received from Bishop Trust Company, Limited,
Executor of the Will of John A. McCandless, De-

ceased, Probate No. 8077, First Judicial Circuit, Territory of Hawaii, the sum of Twenty Thousand Five Hundred Four and 58-100 Dollars (\$20,504.58) and the following property:

Real Property:

Northwesterly half of Lot #33, Section 5, Oahu Cemetery Association, Honolulu, T. H., area 300 sq. ft.

Personal Property:

Stocks:

McCandless Building Company.....	608 shares
Cert. No. 42	
John A. McCandless & Company.....	25848 shares
Cert. No. 49	
Alexander & Baldwin Ltd.....	200 shares
Certs. Nos. 863 150 shares	
864 50 "	
—	
Bank of Hawaii.....	153 shares
Cert. No. B273	
Bishop Trust Company, Ltd.....	250 shares
Cert. No. C589	
C. Brewer & Company, Ltd.....	216 shares
Cert. No. A1472	
Home Finance Company.....	1200 shares
Cert. No. 120	
Home Insurance Company.....	1000 shares
Cert. No. 424	
Inter-Island Steam Navigation Co.....	1700 shares
Cert. No. 4560	

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Oahu Sugar Company.....	2500 shares
Certs. Nos. 22579 500 shares	
22580 500 "	
22581 500 "	
22582 500 "	
22611 500 "	

People's Bank of Hilo	40 shares
Cert. No. 55	
Pioneer Mill Company.....	3740 shares
Certs. Nos 14104 to 14108 incl. 14138, 14139 for 500 shares each & 15614 for 240 shares.	
Royal Hawaiian Coffee Co.,.....	25 shares
Cert. No. 10	
Waialua Agricultural Co.,.....	300 shares
Certs. Nos. H22526 200 shares H23095 100 "	
<hr/>	
Kona Tobacco Company.....	81 shares
Certs. Nos. 31 20 shares 55 41 " 95 10 " 125 10 "	
<hr/>	
Western Pacific Railway Co.,.....	1100 shares
Certs. Nos. 1948 to 1952 incl. for 100 shares ea. 1953 for 30 shares & #1959 for 70 shares.	
California Market Properties Co.....	100 shares
Cert. No. 23	
Pacific Wool Products Company.....	15000 shares
Certs. Nos. 5 5000 shares 25 2500 " 32 7500 "	
<hr/>	
River Farms Company of California.....	1 shares
Cert. No. 347	
Pacific Gas & Electric Co.....	66 shares
Certs. Nos. F8704 5 shares F118315 6 " F140829 55 " Issued in name of — Bishop Trust Co., Ltd.. Trustee under Will of J. A. McCandless.	

Bonds:

Republic of Mexico 5% 1945

Consolidated External Gold Loan of 1899

1/£200 Series "C" #038094 with coupon #13 Series 39
a.s.c.a.26/£100 Series "D" #096892, 095827, \$95010, 094904,
094903, 052002, 092209, 092180, 087728, 086732,
085318, 084353, 071373, 068081, 066437, 063851,
063208, 061142, 058284, 056559, 055970, 049398,
048705, 048107, 044670, 043812 with coupon #13

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Series 39 a.s.c.a.

60/£ 20 Series "E" #150661, 151001, 119827, 144333,
142835, 138808, 159548, 147789, 130987, 130145,
130144, 107295, 119644, 150663, 130138, 188360,
188002, 187089, 138327, 163706, 186067, 108856,
104391, 100731, 168418, 130069, 100265, 104263,
128243, 186209, 179892, 176558, 176557, 173614,
169614, 166020, 134603, 160092, 160447, 163170,
163244, 186064, 180247, 179899, 179896, 150879,
146161, 150816, 155829, 159880, 159948, 160091,
119052, 149190, 138056, 156374, 156371, 122136,
150662, 130877, with coupon #13 Series 39
a.s.c.a.Receipt #76772 dated May 21, 1924 of Guaranty Trust
Co. of New York depositary United States of Mexico
for \$8487.51 for coupons or rights to interest in
arrears (Class "A")Imperial Russian Government 5½% Series II War Loan
of 19165/5000 Roubles Nos. 008815, 008816, 008717, 008193,
008585 with coupon #8 a.s.c.a.25/1000 Roubles Nos. 325831 to 325840 incl. 289321 to
289325 incl. 302681 to 302690 incl. with coupon #8
a.s.c.a.Loose coupons #3 - 7 incl. of 50/1000 Roubles
Bonds #291195 to 291244 incl. same issue as above.

Miscellaneous:

3/1177ths undivided interest in real property situate at
#432 California Street, San Francisco, California,
and other remaining assets of Peirce Fair & Co.
transferred to Harry H. Fair, Trustee in September
1933 for the benefit of the stockholders. This interest
in lieu of 3 shares Peirce Fair & Co., a dissolved
corporation.

Jewelry:

- 1 Pair Cat's Eye Shell Cuff Buttons
- 1 " Masonic Cuff Buttons
- 1 Masonic Pendant
- 1 Bone Carving

Representing distribution of all of the assets of
every kind and sort remaining in the Estate of
John A. McCandless, deceased, in accordance with
Paragraph Eighth of the Last Will and Testament
of said John A. McCandless, Deceased, and pur-
suant to Order of the Honorable N. D. Godbold,
Judge of the First Judicial Circuit, Territory of
Hawaii, dated January 21, 1936.

Dated at Honolulu, T. H., this 22nd day of Janu-
ary, 1936.

BISHOP TRUST COMPANY, LIMITED.

By (S) J. K. CLARKE.

Its Vice President.

By (S) E. BENNER JR..

Its Assistant Secretary.

Trustee under the will and of the estate of John
A. McCandless, Deceased.

RESPONDENT'S EXHIBIT A
Title of John A. McCandless, Worcester

Date	Character	Expenditures	Capital Receipts	Expenditures	Capital Receipts	Income	Capital	Income
13/5/						\$ 8,107.04		
February	1 Balance	P. M. Co.						
	Dividend							
7	Radio		\$ 2.02					
15	Dividend	O. S. Co.						
	"	E. P. Co.						
16	"	McB. Co.						
	"	I.I. Ins. Co.						
21	Beneficiary							
25	Dividend	C. B. & Co.						
27	Beneficiary							
	"							
28	"							
	Dividend	W. A. Co.						
March	21							
	"	P. M. Co.						
15	"	O. S. Co.						
	"	A. & B.						
16	"	McC. B. Co.						
	"	H. Ins. Co.						
21	S/D rental							
25	Dividend	C. B. & Co.						
27	Master's fee							
28	Dividend	Bk. of H.						
	"	I.I. S. N. Co.						
29	Beneficiary							
	"							
	"							
April	1 Dividend	P. M. Co.						
	"	O. S. Co.						
15	Federal income tax							
	"	H. Ins. Co.						
16	Dividend	McC. B. Co.						
	"	P. G. & E. Co. (e)						
22	"	C. B. & C.						
25	"							
29	Beneficiary							
	"							
	"							
May	1 Dividend	P. M. Co.						
	"							
3 Tax service								
	"							
8 Dividend		J. A. McC. & Co.						
May	15 Dividend	E. P. Co.						
	"	O. S. Co.						
16	"	H. Ins. Co.						
	"	McC. B. Co.						

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

(Seal) W. H. TILLY,
Clerk, Circuit Court, First Circuit, Territory of
Hawaii.

[Endorsed]: 1st Circuit Court Territory of Hawaii. Filed 1936 Jan 22 PM 3:37. (S) Chas K. Buchanan, Clerk.

[Endorsed]: Petitioner's Exhibit No. 7. Admitted in evidence May 2, 1940.

Respondent's Exhibit A (continued)

Date	Character	Capital		Income		Balance	
		Expenditures	Receipts	Expenditures	Receipts	Capital	Income
1938							
September	" P. M. Co.				\$ 744.26		
" O. S. Co.					497.50		
1 " A. & B.					497.50		
" McC. B. Co.					181.49		
1 " H. Ins. Co.		99.50					
							[80]
Dividend	J. A. McC. & Co.			12,859.38			
" Bk. of Hawaii				304.47			
" C.B. & Co.				229.84			
" I.I.S. N. Co.				507.45			
Beneficiary		\$250.00					
" "		500.00					
" "		250.00					
" "		1,000.00					
	P. M. Co.			744.26			
October	Dividend	O. S. Co.		497.50			
1 " Federal income tax		3,074.69		66,943.77			
Dividend	McC. B. Co.			181.49			
" "	H. Ins. Co.			99.50			
" "	P. G. & E. Co. (c)			24.76			
Photosat, income tax returns		7.50					
Dividend	C.B. & Co.			214.92			
" "	Beneficiary			250.00			
" "				500.00			
" "				250.00			
" "				1,000.00			
	P. M. Co.			744.26			
Dividend	O. S. Co.			497.50			
" "	H. Ins. Co.			99.50			
" "	McC. B. Co.			181.49			
2 " C.B. & Co.				429.84			
Beneficiary		1,000.00					
" "		250.00					
" "		500.00					
" "		250.00					
	W. A. Co.			208.50			
Dividend	P. M. Co.			1,468.52			
" "	O. S. Co.			3,482.50			
1 " A. & B.				895.50			
" H. Ins. Co.				696.50			
" McC. B. Co.				181.49			
" J. A. McC. & Co.				15,431.26			
	B. Tr. Co.			31.09			
Dividend	C.B. & Co.			859.68			
" "	G. B. & Haw.			304.47			
" "	I.I.S. N. Co.			845.75			

		300.00
	"	250.00
	"	250.00
	"	4,334.86
Administrator's com'n,	income	66,936.27
"	corpus	24,151.75
		50,514.48
		54,849.34
		[81]

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Summary		
sh in han Receipts.....	2/1/35	\$ 8,107.04
Income.....		152,854.35
Capital.....		
Penitentiary.....		
Income.....		\$ 79,743.10
Capital.....		73,111.25
Penitentiary.....		
Income.....		29,477.62
Capital.....		110,979.19
Penitentiary.....		
Income.....	ed to Trustee, distrib residual	\$ 20,504.58
Capital.....	legatee, 1/25/36	<u> </u>

Key to Abbreviations

Alexander & Baldwin, Ltd.
Bank of Hawaii
Bishop Trust Co., Ltd.
C. Brewer & Co., Ltd.
Ewa Plantation Co.
Home Insurance Co. of Hawaii, Ltd.
Inter-Island Steam Navigation Co.
Itl.,
John A. McCandless & Co., Ltd.
McCandless Building Co., Ltd.
Oahu Sugar Co., Ltd.
Pacific Gas & Electric Co., Inc.
Pioneer Mill Co., Ltd.
Waihala Agricultural Co., Ltd.

[Title of Cause.]

DESIGNATION OF CONTENTS OF RECORD.
To the Clerk of the United States Board of Tax Appeals:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by and through his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for the purpose of the review which he, the said petitioner on review, has heretofore taken to the United States Circuit Court of Appeals for the Ninth Circuit, hereby designates for inclusion in the record on review the following:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
 - (a) Petition, including annexed copy of deficiency notice,
 - (b) Answer to petition.
3. Opinion of Board promulgated November 27, 1940.
4. Decision of Board entered January 28, 1941.
5. Petition for review and statement of points.
6. Notices of filing petition for review. [83]
7. Statement of evidence and exhibits referred to therein (Petitioner's Exhibits 1 to 7, inclusive, and Respondent's Exhibit A).
8. This designation of contents of record.

Wherefore, it is requested that copies of the record as above designated be prepared and trans-

mitted to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the rules of said Court.

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

Service of a copy of the within designation of contents of record on review is hereby admitted and agreed to this 29 day of April, 1941.

(S) URBAN E. WILD,

(S) MILTON CADES,

Attorneys for Respondent on
Review.

[Endorsed]: U. S. B. T. A. Filed May 13, 1941.

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[Title of Board and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 84, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeclipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of

Tax Appeals, at Washington, in the District of Columbia, this 21st day of May, 1941.

(Seal) B. D. GAMBLE,

Clerk,

United States Board of Tax
Appeals.

[Endorsed]: No. 9832. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Bishop Trust Company, Limited, Executor of the Estate of John A. McCandless, deceased, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed May 26, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit.

U. S. C. C. A. 9832.
B. T. A. Docket No. 97943.

GUY T. HELVERING, Commissioner of Internal
Revenue,

Petitioner on Review,

vs.

BISHOP TRUST COMPANY, LIMITED, EX-
ECUTOR OF THE ESTATE OF JOHN A.
McCANDLESS, DECEASED,

Respondent on Review.

Designation of Portion of the Record
To Be Printed.

Comes Now the petitioner on review herein, and complying with the rules of this Court, pertaining to the designation of the portion of the record to be printed, states that he relies upon the entire record certified by the Clerk of the Board of Tax Appeals to this Court, and directs that said record so certified be printed as the record on review.

Respectfully submitted,
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

STATEMENT OF SERVICE:

A copy of this designation of portion of the record to be printed was mailed to Urban E. Wild, Esq., and Milton Cades, Esq., 400 Bishop Trust Bldg., Honolulu, T. H., attorneys for respondent on review, this date, May 24, 1941.

CHARLES E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed May 28, 1941. Paul P. O'Brien,
Clerk.

